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# Mirror, Mirror on the Wall, What's Transparency After All?

Cheryl A. Kettler\*

## I. INTRODUCTION

Internal Revenue Service (“IRS”) personnel have pursued a new cause in recent years: transparency.<sup>1</sup> When IRS personnel use this term, they refer to the ease with which the IRS can identify problematic transactions in a tax return. They favor transparency because it simplifies the job of the auditor and maximizes the collection of revenue.<sup>2</sup> IRS personnel suggest that transparency is reciprocal; that a taxpayer whose transactions are transparent also sees clearly the grounds for taxation.<sup>3</sup> In reality, the concept better resembles a two-way mirror than a window. Transparency improves the IRS’s identification of problematic transactions but fails to enhance the taxpayer’s understanding of a tax code that has become increasingly difficult to understand and apply.<sup>4</sup>

This discussion of transparency focuses on the 2010 IRS program for the reporting of uncertain tax positions (sometimes referred to as “UTPs”). This program requires certain large, corporate taxpayers to annually reveal detailed information about tax positions the taxpayers have taken in their tax returns that the taxpayers anticipate may be challenged, with or without success.<sup>5</sup> These so-called “uncertain tax positions” are positions for which the taxpayers have established reserves on their financial books. Once the IRS has this information it may more easily identify those issues most likely to produce additional revenue on examination.<sup>6</sup> The prospect of additional guidance being issued by the IRS post-review is a weak incentive for reporting of uncertain tax positions.<sup>7</sup> Moreover, the call for the reporting of uncertain tax positions arguably infringes upon taxpayers’ privilege to

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1. See *infra* notes 56-60 and accompanying text.
2. See *infra* notes 21 and 41 and accompanying text.
3. See *infra* notes 45-46 and accompanying text.
4. See *infra* notes 21 and 45.
5. See *infra* Part II.
6. See *infra* Part III.
7. See *infra* Part IV.

discuss uncertain tax positions with their tax counsel. Once the taxpayer responds to an administrative obligation to reveal the subject matter and rationale of its uncertain tax positions, the taxpayer arguably has waived the privilege, further eroding its right to legitimately structure its activities so as to minimize its income tax liability.<sup>8</sup>

Practitioners point to the public policy debate over transparency in financial reporting by publicly traded companies as the source of recent IRS guidance with respect to uncertain tax positions.<sup>9</sup> The Sarbanes-Oxley Act of 2002 called for chief executive officers and chief financial officers to certify that financial statements contained no misstatements or omissions of material facts that might render the statements misleading.<sup>10</sup> In the years following these enhancements of corporate financial reporting, reporting of tax related matters remained a source of continued concern.<sup>11</sup> In the same year, the IRS revised its 1981-2002 policy of not requesting tax accrual work papers when it examined returns that claimed benefits from such transactions.<sup>12</sup> In July of 2006, the Financial Accounting Standards Board (“FASB”) codified its policies for accounting for tax contingencies, which again improved transparency of financial statement reporting.<sup>13</sup> Effective for tax years ending on or after December 31, 2004, the IRS imposed new requirements that corporations reconcile book and tax record differences in Schedule M-3 of IRS Form 1120.<sup>14</sup>

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8. See *infra* Part V.

9. DELOITTE, PROPOSED U.S. TAX REPORTING REQUIREMENTS FOR UNCERTAIN TAX POSITIONS: THE LATEST STEP IN A JOURNEY TOWARD ENHANCED TAX GOVERNANCE AND TRANSPARENCY 2 (2010), available at [http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Tax/us\\_tax\\_UTP\\_042010.pdf](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Tax/us_tax_UTP_042010.pdf) (summarizing the events described in this section).

10. Sarbanes-Oxley Act of 2002 § 302, Pub. L. 107-204, 116 Stat. 745 (codified as amended at 15 U.S.C. § 7241 (2006)); see generally *TEI's New Year's Resolutions Include Continuing Focus on Tax Advocacy*, 62 TAX EXECUTIVE 8, 8 (2010) (discussing the role of securities legislation and independent auditors' reforms in spurring tax examinations in recent years).

11. *TEI's New Year's Resolutions Include Continuing Focus on Tax Advocacy*, 62 TAX EXECUTIVE 8, 8 (2010) (“Accounting for income taxes, however, is the most prevalent issue related to the application of U.S. GAAP reported in 2008, 2007, 2006.”).

12. See Melissa Maleske, *Open Secrets Ruling on IRS Summons for Sensitive Tax Documents Could Have Broader Implications for Privilege*, INSIDE COUNSEL, Nov. 1, 2009.

13. FINANCIAL ACCOUNTING STANDARDS BOARD, FASB INTERPRETATION NO. 48, ACCOUNTING FOR UNCERTAINTY IN INCOME TAXES: AN INTERPRETATION OF FASB STATEMENT NO. 109 (2006), available at [http://www.fasb.org/pdf/aop\\_FIN48.pdf](http://www.fasb.org/pdf/aop_FIN48.pdf) [hereinafter FIN 48]. See generally *IRS Implements New Corporate “Audit Me” Disclosure Requirement*, BUTLER SNOW PLANNING NOTES, Aug. 6, 2010, at 1, 3, available at <http://www.butlersnow.com/WorkArea/linkit.aspx?LinkIdentifier=ID&ItemID=4239> (explaining that changes in rules relating to booking of tax reserves were intended to address situations in which corporate officers “smooth[ed] out corporate earnings” by adjusting such reserves).

14. I.R.S. Form 1120 Schedule M-3 (2004), available at <http://www.irs.gov/businesses/corporations/article/0,,id=119992,00.html>.

Efforts to amend Internal Revenue Code ("I.R.C." or the "Code") section 6062 to require the chief executive officers of large corporations to sign corporate tax returns under penalties of perjury so as to enhance their accountability for reporting taxable income proved unsuccessful.<sup>15</sup> In 2006, the IRS geared up to accelerate examination and resolution of issues relating to uncertain tax positions. At about the same time, the Securities and Exchange Commission ("SEC") required reporting of penalties associated with certain transactions reportable to the IRS.<sup>16</sup> In 2010, the SEC imposed additional reporting requirements with respect to proxies that require corporations to report how their boards of directors monitor tax obligation risks.<sup>17</sup>

These initiatives are consistent with reporting requirements imposed in other countries.<sup>18</sup> They preceded additional speeches by IRS personnel in which the topics of risk oversight, uncertain tax positions, and board accountability figured prominently.<sup>19</sup>

These initiatives herald a period of more aggressive IRS examination of issues, returns, and taxpayers.<sup>20</sup>

## II. UNPRECEDENTED REVELATION OF UNCERTAIN TAX POSITIONS

Effective December 15, 2010, corporations with assets equal to or greater than \$100 million must complete and file IRS Form 1120 Schedule UTP to report certain tax positions that affect their tax liabilities, including those stated in the corporations' audited financial

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15. BUTLER SNOW, *supra* note 13, at 3; *see* National Employee Savings and Trust Equity Guarantee Act, S. 1971, 107th Cong. § 511 (2002).

16. American Jobs Creation Act of 2004, 26 U.S.C. § 6707A(e) (2010).

17. Reg. S-K, item 407(h), 17 C.F.R. § 240.14a-101 (2010).

18. DELOITTE, *supra* note 9, at 3-4. IRS Commissioner Douglas Shulman pointed to these foreign initiatives in his October 16, 2009 speech to the National Association of Corporate Directors at which he proposed more corporate board oversight of tax return risks. *Id.* at 4.

19. DELOITTE, *supra* note 9, at 5; *see also* Requirement of a Statement Disclosing Uncertain Tax Positions, 75 Fed. Reg. 240, 78,160 (Dec. 15, 2010) (to be codified at Treas. Reg. § 1.6012-2).

20. Few in the tax area view the new reporting requirements as an opportunity to reciprocate by more transparent sharing of tax information in exchange for more transparent tax guidance:

In its Announcement 2010-30 issued in April 2010, the IRS issued a proposed Schedule UTP (Uncertain Tax Positions Statement) and related instructions. If completed properly, the proposed schedule will report areas in which the IRS can easily assert additional taxes are owing. In so doing, Schedule UTP will make the IRS auditors far more efficient because it contains information that the auditors currently have to determine themselves. If the number of auditors remains constant, the IRS will be able to audit more taxpayers, more tax years, and more issues.

David Nolte, *Supreme Court Certiorari Decline Paves Way for IRS Proposal of Important Tax Return Disclosure*, <http://www.hgexperts.com/article.asp?id=19343>; *IRS: What's In Your Reserve?*, CFO MAG., Aug. 24, 2010.

statements.<sup>21</sup> The final regulation applies to returns filed for tax years beginning on or after January 1, 2010.<sup>22</sup>

Affected corporations are those that: (1) “issue or are included in audited financial statements”; and (2) “have assets that equal or exceed \$100 million.”<sup>23</sup>

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21. Prop. Treas. Reg. § 1.6012-2(a)(5) (2010); IRS Form 1120 Schedule UTP, available at <http://www.irs.gov/pub/irs-pdf/f1120utp.pdf> [hereinafter SCHEDULE UTP]; Instructions for IRS Form 1120 Schedule UTP, available at [http://www.irs.gov/pub/newsroom/2010\\_instructions\\_for\\_sch\\_utp.pdf](http://www.irs.gov/pub/newsroom/2010_instructions_for_sch_utp.pdf) [hereinafter UTP INSTRUCTIONS]. These corporations will file IRS Forms 1120, 1120-F, 1120-L, and 1120-PC. UTP INSTRUCTIONS at 1. In addition to filing the Schedule UTP with the applicable return, such corporations shall mark a box on the respective return to indicate that they have prepared the schedule. UTP INSTRUCTIONS at 1-2.

The original proposal called for compliance by all corporations with assets equal to or greater than \$10 million. Draft Instructions IRS Form 1120 Schedule UTP at 2 (Apr. 19, 2010), available at [http://www.irs.gov/pub/irs-utl/schedule\\_utp\\_draft\\_instructions\\_2\\_.pdf](http://www.irs.gov/pub/irs-utl/schedule_utp_draft_instructions_2_.pdf). The final version of the Schedule UTP anticipates a phase-in over five years for corporations with assets less than \$100 million and for some pass-through entities, a development presaged by the current, expansive scope of FIN 48. Shahzad Malik, *Announcement 2010-9 Introduces New Tax Reporting Transparency Standards*, 2010 EMERGING ISSUES 4903 (2010) (including C corporations that pay taxes at the business entity level; not-for-profit corporations; pass-through entities (for which the owners generally pay the tax), such as partnerships, limited-liability companies and S corporations; real estate investment trusts; regulated investment companies; and, even more problematically, private investment funds). Accordingly, the reporting threshold will drop to \$50 million in 2012 and to \$10 million by 2014. I.R.S. Announcement 2010-75, 2010-41 I.R.B. 428 (Sept. 24, 2010).

22. Prop. Treas. Reg. § 1.6012-2(a)(5) (2010) (“[T]he proposed regulation applied to returns filed for tax years beginning after December 15, 2009, and ending after the date the regulations were published in the Federal Register”); Requirement of a Statement Disclosing Uncertain Tax Positions, 75 Fed. Reg. 54,802 (proposed Sept. 9, 2010).

23. UTP INSTRUCTIONS, *supra* note 21, at 1. When an affiliated group files a consolidated tax return, the group need not identify which member of the group recorded the reserve or otherwise was related to the uncertain tax position. UTP INSTRUCTIONS, *supra* note 21, at 2. If the affiliate files a separate tax return, then it must report as though not a member of the affiliated group. UTP INSTRUCTIONS, *supra* note 21, at 2. The new program with respect to uncertain tax positions capitalizes on the FASB requirements that independent auditors examine the book reserves for tax matters of the companies they audit. *See supra* text accompanying note 15.

Lastly, [one commentator] advised preparers to brush up on their accounting and auditing knowledge for FIN 48 purposes:

“As we go forward, preparers will have to take the FIN 48 analysis of uncertain tax positions and lay them out on the new Schedule UTP,” he said. “While it applies to corporations with over \$100 million in assets during tax year 2010, the threshold gets reduced to \$50 million in assets in 2012 and \$10 million in assets in 2014. And the IRS will look at extending it to include partnerships, S corporations and tax-exempt organizations beginning in 2011.”

Roger Russell, *Gear Up for Tax Season: New Regs, Legislative Uncertainty Mean a Murky Start to 2011*, ACCOUNTING TODAY, Dec. 13, 2010, available at [http://www.accountingtoday.com/ato\\_issues/24\\_16/gear-up-for-tax-season-56413-1.html](http://www.accountingtoday.com/ato_issues/24_16/gear-up-for-tax-season-56413-1.html); *see* I.R.S. Announcement. 2010-75, 2010-41 I.R.B. 428 (Sept. 24, 2010).

The application of the Schedule UTP to non-corporate entities requires further consideration. Edward Froelich & James E. Merritt, *Schedule UTP: The IRS's Most Aggressive Tax Position To Date*, MONDAQ, Oct. 13, 2010, available at <http://www.mondaq.com/unitedstates/article.asp?articleid=112264> (“An uncertain tax position is relevant only to entities that have to establish

Tax positions must be reported on Form 1120 Schedule UTP if the corporation took a position for the current or a prior year<sup>24</sup> on its tax return and either the corporation or a related party<sup>25</sup> has recorded a reserve<sup>26</sup> relating to the position in its audited financial statements,<sup>27</sup> or neither the corporation nor the related party recorded a position because the corporation intends to litigate.<sup>28</sup> Tax positions are positions that, if rejected by the IRS, would produce a line item adjust-

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reserves with respect to income tax liabilities, but pass-through entities do not have income tax liabilities and therefore no uncertain income tax positions.”).

24. The Instructions for the new Schedule UTP provide that tax positions for prior returns that the taxpayer reported in prior years need not be disclosed in Part II of the schedule, unless the tax position affects the current year. In that event, the tax position taken in a prior tax year also must be reported in Part I, dealing with positions taken in the current year. UTP INSTRUCTIONS, *supra* note 21, at 1. A tax position may be taken with respect to a year in which no event is reported, e.g., when a taxpayer decides to take a deduction in one year rather than another. In that event, the UTP Instructions provide that a position has been taken with respect to both years as the IRS's challenge of the item could move the deduction from one year to the other. UTP INSTRUCTIONS, *supra* note 21, at 2.

25. Related party is defined in accordance with I.R.C. §§ 267(b), 318(a), 707(b) and also includes any entity included in a consolidated audited financial statement that includes the corporation filing IRS Form 1120 Schedule UTP. UTP INSTRUCTIONS, *supra* note 21, at 2.

26. A reserve is relevant if intended to cover tax, interest or penalties. UTP INSTRUCTIONS, *supra* note 21, at 2. It is the creation, rather than the adjustment of the reserve that may trigger the corporation's responsibility to report via IRS Form 1120 Schedule UTP. See UTP INSTRUCTIONS, *supra* note 21, at 2.

27. Such positions in audited financial statements may be characterized as having been made by an independent certified public accountant pursuant to FIN 48. See FRESHFIELDS BRUCKHAUS DERINGER US LLP, DISCLOSURE OF UNCERTAIN TAX POSITIONS 1 (2010), available at <http://www.freshfields.com/publications/pdfs/2010/feb10/27636.pdf>.

28. UTP INSTRUCTIONS, *supra* note 21, at 1.

The final Schedule requires two types of uncertain tax positions to be reported: (1) a tax position for which a reserve was recorded, and (2) a tax position for which no reserve was recorded based on an expectation to litigate. The IRS dropped a proposed additional category of positions for which no reserve was established because of the administrative practice of the IRS. The Commissioner explained that, in consideration of comments received, this category was not sufficiently administrable and may have determined that such positions were not likely to be a source of significant noncompliance.

Froelich & Merritt, *supra* note 23. The utility of this information to the IRS is that inclusion of such positions in a corporation's return would help to identify and quantify the taxpayer's relative exposure with respect to positions for which authority was less clear. Any mathematical equation that defines a variable reduces the number of unknowns that must be resolved by the equation. The IRS did not abandon every reporting obligation that might prove to add little to the nation's tax revenues. Even after comment, the IRS provides that a corporate taxpayer must report on IRS Form 1120 Schedule UTP a tax position taken on its return for which no reserve for income tax was recorded if the tax position is one that the taxpayer or a related party determines the probability of settling with the IRS to be less than fifty percent and no reserve was recorded because the corporation intends to litigate the tax position and has determined that it is more likely than not to prevail on the merits in the litigation. UTP INSTRUCTIONS, *supra* note 21, at 1, 2. The obligation to report for a year requires both the taking of the uncertain tax position and the establishment of the reserve. UTP INSTRUCTIONS, *supra* note 21, at 3.

ment (or a Code section 481(a) adjustment) on the corporation's tax return.<sup>29</sup> Audited financial statements include those prepared to comply with United States generally accepted accounting practices ("GAAP"), International Financial Reporting Standards ("IFRS"), a variant established in another country, or a modification of any of the foregoing.<sup>30</sup> Excluded are those positions for which no reserve was established because "the amount was immaterial" in the preparation of audited financial statements or the position was clear enough that no reserve was warranted.<sup>31</sup> For 2010, the taxpayer need not report in Part II uncertain tax positions taken with respect to reserves established prior to 2010.<sup>32</sup>

Required reporting includes the following information:<sup>33</sup> (1) a list of each uncertain tax position taken; (2) identification of up to three of

29. UTP INSTRUCTIONS, *supra* note 21, at 1, 2. A line item that may be affected by multiple positions gives rise to multiple reporting obligations. UTP INSTRUCTIONS, *supra* note 21, at 1, 2.

30. UTP INSTRUCTIONS, *supra* note 21, at 1.

31. UTP INSTRUCTIONS, *supra* note 21, at 1. The Instructions further provide:

[T]he tax position is one which the corporation or a related party determines the probability of settling with the IRS to be less than 50% and, under applicable accounting standards, no reserve was recorded in the audited financial statements because the corporation intends to litigate the tax position and has determined that it is more likely than not to prevail on the merits of litigation.

UTP INSTRUCTIONS, *supra* note 21, at 2.

32. UTP INSTRUCTIONS, *supra* note 21, at 2.

33. Froelich and Merritt state the following regarding an uncertain tax position:

A tax position is based on the unit of account in the audited financial statements in which the reserve is recorded. The IRS is requiring consistency between GAAP reporting and UTP reporting in this regard. A tax position taken in a tax return means a tax position that would result in an adjustment to a line item on that tax return if the position is not sustained. A line item on a tax return may be affected by multiple units of account, in which case each unit of account must be reported separately on Schedule UTP. An example of this is the research credit under Code section 41, which appears on Form 6765 as a single credit amount. Multiple units of account can affect that amount. The instructions to the final UTP use the research credit to illustrate the unit of account approach to determining the position that is reported. In example 5, the instructions describe two corporations that each undertook two research projects giving rise to the research credit. The first corporation collects its creditable expenses at the project level, so its computation of the research credit is composed of two units of account, each of which must be reported on the UTP, assuming the corporation has determined that each position, as defined by the unit of account, is uncertain. The second corporation has adopted a functional expense unit to collect its creditable expenses and so must report each functional expense unit as positions, again only if the corporation has determined there is an uncertainty regarding each of those positions.

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There was an uncertainty in the draft schedule regarding whether foreign tax positions had to be reported. For example, a company may have an uncertainty regarding a foreign tax credit computation where the uncertainty flowed from a determination of foreign tax law, not domestic tax law. Announcement 2010-75 clarified by stating that a corporation is required to report a U.S. federal income tax position taken in a return

the relevant Code provisions; (3) identification of the timing of the position as permanent or temporary;<sup>34</sup> (4) the Employer Identification Number of any pass-through entity involved in the transaction; (5) the tax year in which the uncertain tax position was taken if not the current year; (6) a ranking of uncertain tax positions based on the reserve amounts (including reserves for interest and penalties) allocable to the position and a designation of those positions that account for ten percent or more of the total reserves;<sup>35</sup> and (7) a concise description of each uncertain tax position taken in the current or prior tax years.<sup>36</sup> With respect to ranking of uncertain tax positions in light of reserve size, rankings will not necessarily reflect the taxpayer's actual reserves.<sup>37</sup> Taxpayers also must provide in Part III of the Schedule a concise description of their uncertain tax positions, which "should not include an assessment of the hazards of a tax position or an analysis of the support for or against the tax position."<sup>38</sup>

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that arises out of uncertainty with regard to a foreign tax position (e.g., foreign tax credits) if a reserve for U.S. federal income tax was recorded to reflect that uncertainty.

This clarification raises an interesting question. Suppose that the uncertainty regarding the foreign tax credit stems from an uncertainty about foreign tax law and not the U.S. treatment of the foreign tax as a credit. If the issue is an item on a foreign tax return, it is not apparent how the IRS would have authority to audit such return and that would not seem to be the purpose of the schedule, which focuses on uncertain domestic tax positions based on domestic law.

Froelich & Merritt, *supra* note 23.

34. Based on treatment in the audited financial statements.

35. The IRS admitted that its compromise on reporting rankings and not maximum tax adjustment "is expected to allow the Service to more accurately evaluate the materiality of the issues reported on the schedule and to impose less burden on corporations than would have been the case under the maximum tax adjustment proposal." I.R.S. Announcement 2010-75, 2010-41 I.R.B. 428 (Sept. 24, 2010).

36. UTP INSTRUCTIONS, *supra* note 21, at 4-5. Omitted from the final Schedule UTP were (1) whether the position relates to a general administrative practice of the IRS that ordinarily would not subject the transaction to review; (2) the maximum tax adjustment involved; and (3) whether the position is a "major tax" position. *See, e.g.,* FRESHFIELDS BRUCKHAUS DERINGER US LLP, *supra* note 27, at 1; Froelich & Merritt, *supra* note 23. A "major tax" position was one found, relative to other uncertain tax positions for which a reserve was established for the year, to be greater than or equal to ten percent. Draft IRS Form 1120 Schedule UTP, pt. I; Draft Instructions, IRS Form Schedule UTP at 4. Moreover, the final Schedule UTP omits the requirement that taxpayers explain the "rationale and nature of the uncertainty" for each position reported. I.R.S. Announcement. 2010-75, 2010-41 I.R.B. 428 (Sept. 24, 2010). Instead, taxpayers must provide relevant facts so as to inform the IRS of the position and the nature of the uncertain legal issue involved. *Id.*

37. UTP INSTRUCTIONS, *supra* note 21, at 2. Affiliated groups that file consolidated returns rank based on the affiliated group's consolidated position. UTP INSTRUCTIONS, *supra* note 21, at 3. The taxpayer need not rank those positions for which no reserve was established due to intent to litigate. UTP INSTRUCTIONS, *supra* note 21, at 3. However, it must assign them a ranking number but the number may be "any ranking number." UTP INSTRUCTIONS, *supra* note 21, at 4.

38. UTP INSTRUCTIONS, *supra* note 21, at 5.



Filing of IRS Schedule UTP dispenses with the obligation to file IRS Form 8275 (Disclosure Statement) or Form 8275-R (Regulation Disclosure Statement), each relating to disclosures required to avoid accuracy-related penalties.<sup>39</sup> It is as yet unclear what penalty might attach if a corporate taxpayer neglects to file the form.<sup>40</sup>

The IRS announced its proposal with respect to reporting of uncertain tax positions in 2010, stating that the proposal would improve “tax compliance and administration.”<sup>41</sup> It explained its strategy as follows: “The proposal does not require the taxpayer to disclose the taxpayer’s risk assessment or the tax reserve amounts, even though the Service can compel the production of this information through a summons.”<sup>42</sup> However, despite critical public comment, the IRS did re-

39. UTP INSTRUCTIONS, *supra* note 21, at 3. A full disclosure on Schedule UTP also will satisfy disclosure requirements under I.R.C. § 6662(i) for a transaction that is not reportable. I.R.S. Announcement 2010-75, 2010-41 I.R.B. 428 (Sept. 24, 2010).

40. See Froelich & Merritt, *supra* note 23; see also FRESHFIELDS BRUCKHAUS DERINGER US LLP, *supra* note 27, at 1.

41. I.R.S. Announcement 2010-9, 2010-7 I.R.B. 408 (Jan. 26, 2010). Subsequent relevant announcements include I.R.S. Announcement 2010-17, 2010-13 I.R.B. 515 (Mar. 5, 2010); I.R.S. Announcement 2010-30, 2010-19 I.R.B. 668 (May 10, 2010). The IRS announced its proposed rulemaking in September. Requirement of a Statement Disclosing Uncertain Tax Positions, 75 Fed. Reg. 54,802 (proposed Sept. 9, 2010). Thereafter, it noted its receipt of many comments, including questions about the authority of the IRS to require the disclosures and queries about how the IRS would use disclosed information, whether the IRS would continue its “restraint” in exercising its summons power, how the disclosures might affect corporate relationships with advisors, independent accounting firms and the IRS. I.R.S. Announcement 2010-75, 2010-41 I.R.B. 428 (Sept. 24, 2010). In response to these comments, the IRS modified the form in several key respects. It did not, however, exclude from coverage corporations involved in continuous auditing or the Compliance Assurance Program (“CAP”). See *id.* Instead, the IRS announced that it would address treatment of CAP participants in upcoming CAP guidance. *Id.* The failure of draft guidance to address CAP participants is particularly interesting, as IRS Commissioner Douglas Shulman directly “linked transparency to faster issue resolution based on the experience of the IRS’s Compliance Assurance Process (CAP) program.” DELOITTE, *supra* note 9, at 2; see also DELOITTE, UNCERTAIN TAX POSITIONS AND THE IRS TRANSPARENCY INITIATIVE: NO HOLDS BARRED 2 (2010), available at [http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Tax/us\\_tax\\_UTP2\\_072710.pdf](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Tax/us_tax_UTP2_072710.pdf). According to Deloitte, Commissioner Heather Maloy of the IRS’s Large and Mid-Size Business Division referred to the uncertain tax position program as an effort to reduce time spent on issue identification “similar to the IRS’s experience with the Compliance Assurance Program (CAP), which has contributed to more efficient and effective resolution of issues.” *Id.* at 2 (quoting Heather Maloy, Commissioner of the IRS Large and Mid-Size Business Division, Deloitte Dbriefs Panel Discussion (May 10, 2010)). Some of the critical tensions between the CAP and uncertain tax position program are that in CAP, the dialogue over tax positions takes place prior to filing, and participants avoid post-filing examinations, but with uncertain tax positions, no dialogue precedes filing of returns, and examination arguably becomes more likely. See generally I.R.S. Announcement 2005-87, 2005-50 I.R.B. 1144 (Dec. 12, 2005) (discussing the CAP requirements); Rev. Proc. 2005-32, 2005-1 C.B. 1206 (June 6, 2005) (discussing closing of a tax year).

42. I.R.S. Announcement 2010-9, 2010-7 I.R.B. 408 (Jan. 26, 2010) (citing *United States v. Arthur Young & Co.*, 465 U.S. 805, 815 (1984)). The announcement goes on to state that the IRS will continue to exercise restraint in issuing such summonses. *Id.*

quire that taxpayers reveal even those positions for which no reserves are created due to the decision to litigate. It explained that a taxpayer “would continue to document its decision in the same way as it *substantiates* any decision not to record a reserve in its financial statements.”<sup>43</sup> It is not yet clear whether this may require more disclosure than appears in audited financial statements.

Moreover, the IRS acknowledged that certain issues were deferred for later consideration and guidance including how to handle reporting in the year a corporation was sold or acquired, and the degree of research required when disclosing related party or pass-through entity data.<sup>44</sup>

The Service received comments during the regulation’s final review process:<sup>45</sup>

One commentator asked that the proposed regulation not be adopted because Schedule UTP would require the disclosure of privileged information. If the regulation is adopted, the commentator recommended it should state that taxpayer may assert any applicable privileges to providing information sought by Schedule UTP and that any disclosure of information on that schedule will not constitute a waiver of any applicable privilege.

The final regulation does not adopt this recommendation. The regulation addresses the IRS’s authority to require certain corporations to provide information concerning uncertain tax positions. The IRS has decided to require the filing of Schedule UTP based on its determination that the information about uncertain tax positions taken in a tax return required by the schedule is essential to achieving an effective and efficient self-assessment tax system. Provisions relating to the assertion of privilege are not included in this regulation, since it does not affect the existence of any applicable privileges taxpayers may have concerning information requested by a return or how they may assert those privileges.<sup>46</sup>

Other comments influenced the proposed regulations relating to the new Schedule UTP:

Many of the major changes announced by the IRS were welcomed by tax practitioners:

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43. I.R.S. Announcement 2010-75, 2010-41 I.R.B. 428 (Sept. 24, 2010) (emphasis added).

44. *Id.*

45. The process by which this dramatic change in the tax preparation dynamic was introduced did not demonstrate improved IRS and taxpayer cooperation. The early draft of the UTP form was aggressive and compromises achieved were accordingly marginalized. See, e.g., Jeremiah Coder, *News Analysis: Understanding Taxpayers’ Problems*, 2010 TAX NOTES TODAY 200-4 (2010).

46. I.R.S., Requirement of a Statement Disclosing Uncertain Tax Positions, available at [http://www.irs.gov/irb/2011-06\\_IRB/ar08.html#d0e970](http://www.irs.gov/irb/2011-06_IRB/ar08.html#d0e970).

1. Eliminating the intrusive request for work product or privileged information by no longer requiring the taxpayer to explain why a position is an “uncertain tax position” and to state the “maximum tax adjustment” relating to such position. Furthermore, the Commissioner and the instructions specifically state that no risk analysis is required to be produced in the UTP schedule.
2. Providing for many taxpayers, but not all, that the IRS in the course of an examination will not assert that the taxpayer has waived the attorney client, Section 7525 or work product privileges by producing information to its audit firm in connection with a financial statement audit.
3. Eliminating the requirement that positions for which a financial statement reserve is not established because of the administrative practice exception be reported on the UTP schedule.
4. Deferring any requirement that pass-through entities prepare a UTP schedule as well as any proposal to impose additional penalties based upon the manner in which a UTP schedule is prepared.

We discuss these in more detail below, but we note that although these changes are welcome, they do not resolve all concerns about maintaining confidentiality in view of the requirement to file Schedule UTP.<sup>47</sup>

Other desired amendments were rejected including items conceded by the IRS in audits of the reporting corporation for the preceding five years.<sup>48</sup> The IRS stated that this omission “would be inconsistent with the purposes and objectives underlying the new reporting requirement and that it is important to obtain reporting of all types of uncertain tax positions.”<sup>49</sup>

In IRS Announcement 2010-76, the IRS claimed that it would expand its “restraint” in the handling of tax accrual work papers and would “forgo seeking particular documents that relate to uncertain tax positions and the workpapers that document the completion of Schedule UTP.”<sup>50</sup> The policy of restraint is explained as (1) forbearance from arguing during examination that privilege has been waived when tax accrual workpapers otherwise subject to attorney-client privilege,

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47. Froelich & Merritt, *supra* note 23. There are tax professionals who remain optimistic: Pamela F. Olson of Skadden, Arps, Slate, Meagher & Flom LLP agreed. “I think the IRS has listened carefully to comments of the large business taxpayer community and has taken considered steps to address the concerns they expressed,” she told Tax Analysts. “What they’ve outlined also indicates they’ve heard the concerns about the need to resolve issues, not just raise them.”

Coder, *supra* note 45.

48. I.R.S. Announcement 2010-75, 2010-41 I.R.B. 428 (Sept. 24, 2010).

49. *Id.*

50. I.R.S. Announcement 2010-76, 2010-41 I.R.B. 432 (Sept. 24, 2010); *see also* I.R.M. § 4.10.20.3.

work product privilege or privilege under I.R.C. § 7525 were shared with independent auditors; (2) entitling the taxpayer to redact such information when responding to a general summons for work papers generated in the tax reconciliation process; and (3) being subject to an exception in the event of other waiver of privilege, "unusual circumstances," or participation in certain listed transactions.<sup>51</sup>

Respect for the professional responsibility of attorneys to their clients is marginal at best. With respect to newly effective regulations that require anyone who prepares or signs a tax return to first obtain an IRS-issued (PTIN) identification number, one commentator stated the following:

To prepare for the season ahead, [one commentator] suggested that preparers re-arrange their view of the world and think of the government as their new boss. "Always remember you're working for the government first and your clients and your firm second," he said.

"The actual steps you have to do to get ready for you new boss include getting your PTIN, becoming an e-file provider, having your Section 7216 client consent forms ready, reviewing the proposed changes to Circular 230 rules, and brushing up on accounting and auditing, specifically FIN 48 and the new Schedule UTP," he said.

"You can get your PTIN number into next year, but you can't prepare or sign a return until you have it . . . . That applies to everyone who is a paid tax preparer. They want the preparers in cubicles to have those ID numbers to track them down and keep them in line."<sup>52</sup>

The Commissioner of the IRS expressed the same view in different terms:

Working smarter has been a theme of mine since I became Commissioner. But what does working smarter really mean? In the case of the IRS, it means evolving to keep pace with change, constantly looking ahead, and being innovative and more imaginative with available resources inside and outside the agency.

Let me dive down a little deeper into this concept. In many ways, it is all about a leveraged model.

In a classic business sense, leveraging translates to applying a relatively small amount of capital that yields a high level of impact or return for the company and its shareholders. For the IRS, it means maximizing the use of our resources, while tapping into the experience, specialized knowledge, infrastructure, technology and activities of other players in the tax system and making them an integral part of our service and compliance strategies.

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51. I.R.S. Announcement 2010-76, 2010-41 I.R.B. 432 (Sept. 24, 2010).

52. Russell, *supra* note 23.

By leveraging our joint resources, we can advance and support common objectives and outcomes we both desire, such as certainty, clarity and not wasting time and resources. The bottom line is that we can achieve far more working together than either of us could by working alone.<sup>53</sup>

As a practical matter, the IRS did provide some guidance that addresses tax professionals' concerns about their obligation to protect clients' privileged communications.<sup>54</sup> However, this communication falls short of allaying tax attorneys' concerns.<sup>55</sup>

### III. THE CASE FOR TAXPAYER TRANSPARENCY

The case for taxpayer transparency is that this will streamline IRS review of corporate tax returns during a period when the IRS lacks the staff to engage in more thorough review.<sup>56</sup> The Commissioner of the IRS, Douglas H. Shulman, previewed the changes in corporate reporting obligations as follows:

Relationships and paradigms are shifting too as we break down barriers and open doors. This past year, I have spoken at length about

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53. Douglas Shulman, Commissioner, Internal Revenue Service, Keynote Speech Before the AICPA Fall Tax Meeting (Oct. 26, 2010). The Commissioner's characterization of tax return preparers as its missionaries in tax administration continues as follows:

And let's face facts . . . taxpayers want to keep their interactions with the IRS to a minimum. One of the best ways to insure that minimum interaction is for taxpayers to file an accurate and timely return . . . once again, getting it right the first time around.

In a world of greater complexity and sometimes the temptation to push the tax planning envelope beyond acceptable bounds, qualified return preparers can also advise taxpayers on the risk associated with a possible reporting position. They can also explain taxpayer rights and responsibilities. So, we at the IRS see the professional return preparer community as a strong ally in our efforts to boost overall service and compliance.

Now, an individual's return filing is often one of their biggest financial transactions in any given year.

*Id.* The requirement that tax return preparers identify their involvement in tax return preparation enhances the IRS's ability to identify players in the evolution of tax practice it finds inconvenient or uneconomic: "The [PTIN] data base will confirm for the public which return preparers are properly registered with the IRS. It will also make it easier *for everyone* to find and track the bad actors out there. They won't be able to pull up stakes and move around anonymously." *Id.* (emphasis added).

54. Froelich & Merritt, *supra* note 23.

55. See I.R.S. Announcement 2010-76, 2010-41 I.R.B. 432 (Sept. 24, 2010).

56. Jeremiah Coder points out that:

A major premise of the IRS's uncertain tax position (UTP) reporting regime is that disclosing unsettled issues can simplify the examination process by eliminating agents' costly issue identification procedure at the start of a corporate return review. In other words, the IRS wants taxpayers to be more transparent. The agency believes that up-front communication will lead to more efficient use of resources at a time when its staff is stretched thin.

Coder, *supra* note 45.

the IRS retooling its relationship with large corporate taxpayers . . . how we are moving away from protracted trench warfare, which serves neither of us well, to earlier and speedier issue resolution and greater efficiency and certainty.

[W]e are working smarter with some of our largest corporate taxpayers. Our new uncertain tax position reporting requirement is a key element of our larger program to retool our relationship with these taxpayers and create greater efficiency and certainty.

[T]he concept of more transparency is consistent with our nation's historic framework of a voluntary compliance system. Our tax system is set up in such a way that taxpayers fill out their own returns. This self-assessment system reflects the fact that it is the taxpayer, and not the IRS, who possesses all of the information relevant to tax liability. We then use information reported by the taxpayer to make judgments about issues to pursue, and returns to audit.

Inherent in this system is the basic assumption that a taxpayer will be forthcoming in dealing with the IRS with respect to the items it has reported on its tax return, including the underlying positions related to those items. But this is much more than an assumption – it is the foundation on which our tax system is built.<sup>57</sup>

As the Commissioner admitted when he mentioned a “larger program,” the IRS has pursued a number of policies intended to make transparent the dealings of large corporations. Included among these policies are (1) requirements that large taxpayers reconcile differences between book and tax entries,<sup>58</sup> (2) issuance of summonses for tax accrual workpapers of large corporate taxpayers during examinations,<sup>59</sup> and (3) enhanced reporting of tax shelter involvement.<sup>60</sup>

As an example, prior to 2002, the IRS asserted that it pursued a policy of restraint in requesting tax accrual workpapers. It claimed to request these papers only in unusual circumstances.<sup>61</sup> Beginning in 2002, it requested them in any examination of a taxpayer alleged to

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57. Shulman, *supra* note 53. Froelich and Merritt further add:

The idea and eventual implementation of Schedule UTP follows a trend within the IRS to rely on increased taxpayer disclosure. This schedule is perhaps the fullest expression of mandatory disclosure proposed by the IRS to date (with the prior proposed Schedule an even more expansive, and many argued, intrusive, request) for it asks affected taxpayers to list each uncertain tax position and provide a factual description of the same.

Froelich & Merritt, *supra* note 23 (footnote omitted).

58. See *supra* note 15 and accompanying text.

59. See I.R.S. Announcement 2002-63, 2002-27 I.R.B. 72 (July 8, 2002); I.R.M. § 4.10.20.

60. FRESHFIELDS BRUCKHAUS DERINGER US LLP, *supra* note 27, at 2.

61. A full discussion of the work product privilege and additional privileges that arise with respect to the preparation of income tax returns in general and the analysis of tax reserves for financial statement purposes specifically is beyond the scope of this article.

have engaged in an abusive tax shelter.<sup>62</sup> Courts thereafter disagreed as to whether and when it might be permissible for the IRS to issue a summons for tax accrual work papers.<sup>63</sup> In 2010, the United States Supreme Court declined to review a First Circuit case, which held that the attorney's work product privilege did not extend to tax accrual work papers.<sup>64</sup> The new requirement that large corporate taxpayers file Schedule UTP heralds a substantial change in the IRS's aggressiveness in its examination of business' activities.<sup>65</sup> Taxpayers will have to disclose routinely tax and reserve positions even if they do not invest in abusive tax shelters.<sup>66</sup> These changes piggyback on enhanced transparency in corporate financial reporting intended to enhance corporate accountability to shareholders.<sup>67</sup>

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62. See I.R.S. Announcement 2002-63, 2002-27 I.R.B. 72 (July 8, 2002). In an informal survey conducted in 2010, Deloitte reported some of its clients' experiences with IRS requests for tax accrual workpapers in the last three years:

In the last three years, our IRS auditors have:

Issued a blanket [Information Document Request] IDR for tax accrual workpapers	4.4%
Requested tax accrual workpapers	12.7%
Turned over tax accrual workpapers	3.5%
Don't know/not applicable	79.4%

DELOITTE, UNCERTAIN TAX POSITIONS AND THE IRS TRANSPARENCY INITIATIVE NO HOLDS BARRED 7 (2010), available at [http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Tax/us\\_tax\\_UTP2\\_072710.pdf](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Tax/us_tax_UTP2_072710.pdf).

63. The topics of work product, attorney-client, and tax advisor privileges is beyond the scope of this article. For further examination of these issues, see generally Cosme Caballero, Note, *Curbing Corporate Abuse from Jurisprudential Off-Sites: Problematic Paradigms in United States v. Textron Inc.*, 65 U. MIAMI L. REV. 645 (2011); Tracy Hamilton, *Work Product Privilege: The Future of Tax Accrual Work Paper Discovery in the Eleventh Circuit after Textron*, 27 GA. ST. U. L. REV. 729 (2011); Henry J. Lischer, Jr., *Work Product Immunity for Attorney-Created Tax Accrual Workpapers?: The Aftermath of United States v. Textron*, 10 FLA. TAX REV. 503 (2011).

64. *United States v. Textron, Inc.*, 577 F.3d 21 (1st Cir. 2009) (en banc), cert. denied, 2010 U.S. LEXIS 4373 (May 24, 2010). But see *United States v. Deloitte LLP*, 610 F.3d 129, 138-39 (D.C. Cir. 2010) (distinguishing and criticizing the First Circuit's analysis in *Textron*).

65. FRESHFIELDS BRUCKHAUS DERINGER US LLP, *supra* note 27, at 2.

66. FRESHFIELDS BRUCKHAUS DERINGER US LLP, *supra* note 27, at 2.

67. See *supra* notes 11-18 and accompanying text. The IRS explained its basis for claiming the right to view corporations' assessment of the riskiness of their tax positions as follows: "Many taxpayers are required by FASB Interpretation No. 48, *Accounting for Uncertainty in Income Taxes, an Interpretation of FASB Statement No. 109* (FIN 48) to identify and quantify uncertain tax positions taken in the return for financial accounting purposes." I.R.S. Announcement 2010-9, 2010-7 I.R.B. 408 (Jan. 26, 2010) (further explaining that this accounting guidance had been codified as Accounting Standards Codification subtopic 740-10, *Income Taxes*. FASB ASC 740-10). Unlike a summons, which solicits and obtains disclosure of similar information based in part on where the information was generated or maintained, the IRS will use Schedule UTP to solicit and obtain insights regardless of where it may be preserved. The IRS explained that the information "may be reflected in [the corporation's] . . . own books and records or financial statements, or in the books and records or financial statements of a related domestic or foreign entity." *Id.* It does not address directly the fact that the information may well be reflected in

Like a map to buried treasure, Schedule UTP will serve to identify the best prospects for examination.<sup>68</sup> The tax bar should not look to the accounting profession for support in its efforts to stem the erosion of the work product and similar privileges.<sup>69</sup> In its development of FIN 48, the FASB met with tax officials and drew negative conclusions with respect to the probability that audited financial statements might themselves draw audit.<sup>70</sup>

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workpapers generated by tax counsel. Regardless of whether the covered corporations are subject to FIN 48 or a similar accounting standard, the IRS regards the information as “highly relevant” to its understanding of taxpayers’ audit risks and, accordingly, prospects for examination, settlement or litigation. *See id.*

68. *See* I.R.S. Announcement 2010-9, 2010-7 I.R.B. 408 (Jan. 26, 2010) (explaining the types of information that would constitute concise grounds for an uncertain tax position, including, but not limited to, whether the uncertain tax position relates to an item of income, loss, gain, deduction, credit, or computation of basis). In his directive to IRS personnel, Deputy Commissioner for Services and Enforcement, Steven T. Miller, wrote on September 24, 2010:

The Schedule UTP is intended to reduce the time it takes to find issues; ensure that the IRS and taxpayers spend more time discussing the law as it applies to their facts, rather than looking for information; identify areas of uncertainty requiring guidance; and help prioritize selection of issues and taxpayers for exam.

Steven T. Miller, Deputy Commissioner for Services and Enforcement, Directive for All Large Business and International Division (LB&I) Personnel 1 (Sept. 24, 2010), *available at* [http://www.irs.gov/pub/newsroom/internal\\_directive.pdf](http://www.irs.gov/pub/newsroom/internal_directive.pdf). “Some 28 percent of those surveyed [in October 2010 by KPMG] feel IRS examining agents will use the schedule to propose audit adjustments without discussion, while 25 percent feel there will be an increase in IRS audits.” Press Release, KPMG, Executives Anxious About IRS Reporting Requirements for Uncertain Tax Positions Schedule, KPMG Survey Reveals (Oct. 24, 2010), *available at* <http://www.kpmg.com/US/en/IssuesAndInsights/ArticlesPublications/Press-Releases/Pages/Executives-Anxious-About-IRS-Reporting-Requirements-Uncertain-Tax-Positions-Schedule.aspx>.

69. *San Antonio Hosts 64th Annual Conference*, 61 TAX EXECUTIVE 422, 422 (2009) (quoting then new IRS Chief Counsel William J. Wilkins as saying, “Your auditing firms are insisting on much more extensive reviews of materials that you use to make decisions on tax reserves. Auditors are less and less concerned that sharing this information with them will waive an otherwise available privilege.”).

70. Minutes of Feb. 16, 2005 Meeting at 3-6, Financial Accounting Standards Board, [http://www.fasb.org/jsp/FASB/Document\\_C/DocumentPage&cid=1218220100229](http://www.fasb.org/jsp/FASB/Document_C/DocumentPage&cid=1218220100229); *Uncertain Tax Positions—What FIN 48 Means to You*, Perisho Tombor Ramirez Filler & Brown, (May 7, 2010 1:50 PM), <http://perisho.com/keeping-current/uncertain-tax-positions-what-fin-48-means-to-you/>; *see also* David Nolte, *Supreme Court Certiorari Decline Paves Way for IRS Proposal of Important Tax Return Disclosure*, <http://www.hgexperts.com/article.asp?id=19343> (explaining that compliance with FIN 48 requires a “determination [that] is based on the legal authority only, and assumes the IRS audits the return with full knowledge of all relevant information”); BUTLER SNOW, *supra* note 13, at 1, 3 (reporting that at least one IRS official stated after the development of FIN 48 that the FASB guidance would promote auditing of taxpayers and citing to Maria Leone, *FIN 48: Standing Naked Before the IRS*, CFO.com (May 22, 2007)). Taxpayers report more concern than reassurance that the new Schedule UTP will improve their experience with the IRS. “Forty-seven percent of respondents expect the UTP requirements to create tensions among or between their audit firm, tax advisors and tax department, while 22 percent said they did not expect this to occur and 30 percent were not certain.” Press Release, KPMG, Executives Anxious About IRS Reporting Requirements for Uncertain Tax Positions Schedule, KPMG Survey Reveals (Oct. 24, 2010), *available at* <http://www.kpmg.com/US/en/IssuesAndInsights/>



## IV. OPACITY OF TAX GUIDANCE

Corporations hope that in exchange for their openness in the return preparation area that the IRS will provide more insightful guidance with respect to particular industries.<sup>71</sup> The internal IRS directive issued in September of 2010 suggests that compliance with Schedule UTP requirements will produce additional guidance.<sup>72</sup>

As an example, IRS officials acknowledge that the Code is difficult for them and for taxpayers to apply effectively:

For example, the sheer girth and complexity of the tax code continue to grow, in spite of efforts to simplify it. There have been an astonishing 4,400 legislative changes to the Code from 2000 to September of this year.

\* \* \* \*

Our Schedule UTP needs also to be viewed as part of a major restructuring of the relationship with large corporate taxpayers that includes our permanent CAP program, fast-track appeals, industry issue resolution strategies, advanced pricing agreements, and other tools – all aimed at the goal of issue resolution and greater efficiency and certainty.<sup>73</sup>

The IRS's view that its new policy with respect to uncertain tax positions will enhance cooperation with the tax profession presupposes that taxpayers and their professionals agree that "leveraging" of IRS capabilities is efficacious and ethical. This view ignores the stated reservations of many tax professionals and their clients.<sup>74</sup>

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ArticlesPublications/Press-Releases/Pages/Executives-Anxious-About-IRS-Reporting-Requirements-Uncertain-Tax-Positions-Schedule.aspx.

71. According to Jeremiah Coder, "[t]he extent to which the IRS should focus on general public guidance versus guidance on more discrete but pressing industry-focused problems remains a fluid policy determination by the IRS and Treasury." Coder, *supra* note 45.

72. Miller, *supra* note 68. Despite the prospects for improved guidance, the same directive acknowledges that examinations of taxpayers magnify tensions between tax collectors and taxpayers as each seeks to legitimately operate within the confines of existing law.

LB&I examiners should approach UTPs on audit keeping in mind their responsibility to apply the law as it currently exists, not how we would like it to be. . . . In addition, essential to LB&I's success with UTPs is ensuring that examiners conduct examinations consistent with the understanding that UTPs are uncertain for a number of reasons, including ambiguity in the law and a lack of published guidance on issues.

Miller, *supra* note 68.

73. Douglas Shulman, Commissioner, Internal Revenue Service, Keynote Speech Before the AICPA Fall Tax Meeting (Oct. 26, 2010).

74. See, e.g., Press Release, KPMG, Executives Anxious About IRS Reporting Requirements for Uncertain Tax Positions Schedule, KPMG Survey Reveals (Oct. 24, 2010), available at <http://www.kpmg.com/US/en/IssuesAndInsights/ArticlesPublications/Press-Releases/Pages/Executives-Anxious-About-IRS-Reporting-Requirements-Uncertain-Tax-Positions-Schedule.aspx>. In an informal survey conducted in May 2010, Deloitte asked its clients the following question: "Which of the following methods of managing uncertainty would be of most interest to you in light of the new requirement?" The responses were: CAP (26.2%); advanced pricing agreement (6.6%);

The difficulty with IRS leveraging is that internal discussion of pertinent legal issues is not uniformly shared with taxpayers.<sup>75</sup> The publicly visible process for evaluation of taxpayer concerns is the private letter ruling process. However, the process takes time, a requirement that hinders corporate decision making.<sup>76</sup>

The sentiment expressed by the Commissioner to achieve more efficient and fair audits is honorable and optimistic. However, it is not entirely realistic. While the taxpayer possesses all the facts, the IRS possesses the quite overwhelming advantage of discretion in its audit function, especially in regard to what it may or may not treat as an abusive shelter. This client alert is not the forum to consider the authority and discretion of the IRS in this respect. Suffice it to say that such discretion can run contrary to another deeply held sentiment of the American public, namely, to pay the least amount of taxes due in accordance with the rule of law.

The mildly tragic aspect of the release of the final schedule [UTP] is the almost tangible relief expressed by tax practitioners and taxpayers upon learning of the less intrusive approach in the final UTP. Certainly the IRS acted well in listening to the deluge of comments, but is there no, lingering, opposition to the now finalized request for each uncertain tax position to be described to the IRS? Isn't that the equivalent of asking the taxpayer to tell the IRS which positions are those that the IRS has a reasonable chance of winning in court?

Why should the IRS be entitled to that information where analysis of tax positions often turns on important concepts that are undefined, where the Code and published guidance leave vast gray areas of interpretation and every transaction must apparently meet the *Coltec* standard of step-by-step tax-independent meaning?<sup>77</sup>

Few practitioners find comfort in the hinted prospect of a more generously provided guidance that would reduce the legitimate uncertainty of many positions taken by their clients.<sup>78</sup>

The IRS does not promise to become more transparent in its dealings with taxpayers and, as previously stated, continues to express concerns that taxpayer transparency is necessary to address lack of

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ruling request (11.1%); pre-filing agreements (13.6%); none of the above/not applicable (42.5%). DELOITTE, *supra* note 62, at 8.

75. Taxpayers and tax professionals have long objected to IRS secrecy with respect to its interpretations of critical tax provisions: "To the extent that the IRS is giving advice to the field through internal memos or other forms that are not made public, practitioners believe that secrecy is indicative of prejudice, just as the IRS considers taxpayer nondisclosure to be a sign of noncompliance." Coder, *supra* note 45.

76. See Coder, *supra* note 45.

77. Froelich & Merritt, *supra* note 23.

78. See Adele Nicholas, *Prying Eyes: The IRS Is Demanding Unprecedented Access to Companies' Tax Analyses*, INSIDE COUNSEL, July 1, 2010.

compliance. These concerns may have foundation in fact.<sup>79</sup> Whether the data presented with respect to declining tax liabilities is indicative of noncompliance, increased tolerance for tax risk, the failure of “restraint” in addressing work product privilege in the examination process, defensible disparities between book and tax income, declining income, complexity of the Code, or any number of other possible explanations discussed herein may be addressed with tools other than the uncertain tax positions program now underway. As shown herein, many taxpayers and their tax professionals view “transparency” as a window, rather than the mirror that the IRS offers. If taxpayers must report their own concerns about the tax positions they take and face increasing audits at which the IRS knows in advance the taxpayers’ vulnerabilities, and the relative weight accorded to these vulnerabilities in monetary terms and, in some cases, in legal terms, then it appears inadequate that the IRS offers nothing more than that it will examine while applying the law as it exists rather than as the IRS wishes it was. As long as the opacity of the Code remains the source of risk on both sides of the audit process, transparency of taxpayer risk assessments may produce revenues, but it will not foster voluntary compliance. Moreover, it has the potential of converting examination rooms into toll booths with the fare determined based on the collector’s evaluation of the payer’s ability to pay.

#### V. OPTIONS FOR REMEDIAL CLARITY WITH RESPECT TO SCHEDULE UTP

At this juncture, it is impossible to anticipate all of the issues that may arise as corporate taxpayers file their first tax returns including IRS Form 1120 Schedule UTP. Deloitte polled some of its clients who reported that they might need to report substantial numbers of uncertain tax positions:

Based on my current understanding of the UTP proposal, for tax year 2010 the estimated number of UTPs we will have to disclose will be:

None	12%
1-25	41%
25-50	5.4%
Greater than 50	3.5%
Don’t know/not applicable	38.1% <sup>80</sup>

79. See, e.g., Mihir A. Desai & Dhammika Dharmapala, *Earnings Management, Corporate Tax Shelters, and Book—Tax Alignment*, 62 NAT’L TAX J. 169 (2009). If taxpayers, particularly large corporate taxpayers, no longer comply with tax laws, then transparency arguably will improve compliance at a time when revenue generation is critical to meeting federal budgetary needs.

80. DELOITTE, *supra* note 62, at 6.

Among the questions that corporate taxpayers have are how: (1) to discharge obligations to report uncertain tax positions of related parties, some of whom may not themselves be consolidated filers; (2) to account for reserves that relate to uncertainty as to the timing of a tax item; (3) IRS Form 1120 Schedule UTP will affect the preparation of other tax returns and schedules; (4) disclosures may be used by foreign tax authorities; (5) state tax authorities may use disclosures or use IRS Form 1120 Schedule UTP as a precedent for obtaining other tax workpapers; and (6) the IRS and the Department of Justice may use IRS Form 1120 Schedule UTP to obtain additional tax workpapers in litigation and appeals. These open questions are analyzed below

### A. *Related Party Reserves*

Example 2 from the final IRS Instructions for Schedule UTP calls for the disclosure of the tax reserve of a foreign related party.<sup>81</sup> The instructions do not specify what steps a corporate taxpayer must pursue to determine whether a related party has created such a reserve with respect to a particular uncertain tax position or its size (whether in absolute or relative terms).<sup>82</sup>

Taxpayers that book reserves with respect to unconsolidated but related parties may wish to inform themselves of such parties' plans before preparing Schedule UTP as would be the case if "the U.S. taxpayer records a reserve for an item, and then the parent provides for a 'top side' adjustment that changes the amount of the reserve, these two items taken together should be evaluated for ranking purposes and for designation of a "major tax position."<sup>83</sup>

### B. *Temporary Item Reserves*

Example 4 from the final IRS Instructions for Schedule UTP calls for the reporting of an item in *two* years when the taxpayer has reported it in one of the years, but, on review, the taxpayer might have reported the item in another.<sup>84</sup> The instructions do not explain how to

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81. UTP INSTRUCTIONS, *supra* note 21, at 2.

82. See DELOITTE, SCHEDULE UTP: THE NEXT STEP IN TAX GOVERNANCE AND TRANSPARENCY 4 (2010), available at [http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Tax/us\\_tax\\_UTP3\\_121310.pdf](http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Tax/us_tax_UTP3_121310.pdf).

83. Robert Filip, *Our Top UTP Questions That You Should Be Exploring, Now*, A&M TAX ADVISOR WEEKLY, Nov. 16, 2010, available at [http://www.alvarezandmarsal.com/en/global\\_services/tax/enewsletter/archives/DisplayEnewsletter.aspx?enewsletter\\_id=375](http://www.alvarezandmarsal.com/en/global_services/tax/enewsletter/archives/DisplayEnewsletter.aspx?enewsletter_id=375).

84. UTP INSTRUCTIONS, *supra* note 21, at 2-3.

distribute a reserve created with respect to a single year between two years either with respect to size or ranking.<sup>85</sup>

The IRS Instructions for Form 1120 Schedule UTP contemplate that a reserve includes amounts for tax, interest and penalties because they call for the taxpayer to report reserves as though the deduction (or other tax item) were disallowed in the reported year and given effect in another.<sup>86</sup> However, in some circumstances, a taxpayer may have established a reserve solely for interest and penalties because a temporary item, by its nature, has a tax effect at some point, whether sooner or later. The instructions do not specify how to determine size or ranking when the actual reserves do not contemplate the adjustment called for by the instructions.<sup>87</sup>

### C. *Preparation of Supplementary Disclosure Reports*

The IRS Instructions for IRS Form 1120 Schedule UTP provide that items reported on Schedule UTP are treated as having been disclosed for purposes of IRS Forms 8275 and 8275-R.<sup>88</sup> Taxpayers will not necessarily be relieved of the need to make such filings and must instead determine whether there may be additional reportable transactions not disclosed on Schedule UTP.<sup>89</sup> The instructions only address the obligation to report on such other forms an uncertain tax position reported on the schedule.<sup>90</sup> Current guidance does not address whether or not the filing of an amended tax return for tax years beginning with 2010 will require the filing of an amended Schedule UTP.<sup>91</sup>

### D. *Disclosure to Foreign Tax Authorities*

The IRS will share information disclosed on Schedule UTP with foreign tax authorities as required by treaties and information-sharing agreements that the United States has with foreign countries.<sup>92</sup> As already noted, the trend toward greater tax transparency is a global trend. Information sharing between the United States and foreign tax authorities should be assumed.<sup>93</sup> Arguably, some reported positions raise questions that foreign tax authorities may wish to pursue.<sup>94</sup>

85. UTP INSTRUCTIONS, *supra* note 21, at 2-3.

86. UTP INSTRUCTIONS, *supra* note 21, at 1-2.

87. UTP INSTRUCTIONS, *supra* note 21, at 1-2.

88. UTP INSTRUCTIONS, *supra* note 21, at 3.

89. UTP INSTRUCTIONS, *supra* note 21, at 3; *see, e.g.*, I.R.S. Form 6668 (2010).

90. UTP INSTRUCTIONS, *supra* note 21, at 3.

91. DELOITTE, *supra* note 82, at 8.

92. I.R.S. Announcement 2010-75, 2010-41 I.R.B. 428 (Sept. 24, 2010).

93. DELOITTE, *supra* note 82, at 4; Filip, *supra* note 83.

94. Froelich & Merritt, *supra* note 23.

### E. *Disclosures to State Tax Authorities*

The states' responses to the new Schedule UTP filing requirements also have yet to be determined.<sup>95</sup> Commentators have questioned whether states will require taxpayers to attach a copy of the schedule to their states' returns and whether states will require similar reporting, albeit with different consolidation and related party reporting obligations.<sup>96</sup> At the very least, states that currently require attachment of IRS Form 1120 to state income tax returns will continue to do so and thereby obtain data state courts may have denied to them.<sup>97</sup> As the current recession continues, "cash-strapped" states may find Schedule UTP to be fertile ground for tax examinations, as well.<sup>98</sup> It also is unclear whether state tax authorities may argue that filing of the schedule at the federal level constitutes a waiver of privilege that will permit them access to tax accrual and similar work papers.<sup>99</sup>

### F. *Effects on Work Product and Similar Privileges*

IRS Announcement 2010-76 provided that the IRS would forgo during examination arguments that the preparation of audited financial reports waived any of several privileges with respect to tax accrual work papers.<sup>100</sup> However, it does not specify how the IRS or the Department of Justice will address these privileges in the handling of administrative appeals or litigation by either agency in the federal courts.<sup>101</sup>

95. Filip, *supra* note 83 (reporting plans by Alabama and California to require filing of similar schedules).

96. DELOITTE, *supra* note 62, at 6.

97. According to Lutof Awdeh:

Both the IRS's issuance of Schedule UTP and the *Textron* decision have presumably been welcome developments for state taxing authorities. First, given that most states require a corporation to provide a copy of the federal tax return and schedules along with its state tax filing, Schedule UTP will be available to the state taxing authorities for review. This schedule may also encourage states to develop their own version of the UTP schedule that would focus on more relevant state tax audit issues such as nexus and apportionment.

Lutof Awdeh et. al, *Transparency and Compliance in Light of the New Schedule UTP*, 41 TAX ADVISER 531 (2010). This type of information is not now available to most state tax authorities. *Id.* (discussing a taxpayer's victory in *Comm'r v. Comcast Corp.*, 901 N.E.2d 1185 (Mass. 2009)).

98. Charles J. Muller III & Farley P. Katz, *A Tempting Target for Tax-Whistle-Blower Claims*, TEX. LAW., Oct. 5, 2009.

99. See *infra* note 104.

100. See *supra* text accompanying note 51.

101. Filip, *supra* note 83, at 5. "What federal controversy would not be more efficient if one side could learn of uncertainties in the other's position? . . . Efficiency is not a goal for eroding a bedrock principle of federal judicial process." Dave Lindorff, *Tax Window Stays Open*, TREAS. & RISK, Aug. 2, 2010, at 14. See Maleske, *supra* note 12 ("The fear of corporate attorneys is that this erosion of work-product [in the tax arena] could in theory apply to any analysis of legal

The IRS's announcement does not specify whether and to what extent the IRS may issue Information Document Requests during the examination process for the purpose of obtaining fuller explanation of uncertain tax positions reported on Schedule UTP. In his directive to staff of the Large Business and International Division, its commissioner directs his staff to use the schedule to narrow issues for examination prior to issuing Information Document Requests.<sup>102</sup> This suggests that the filing of the schedule will precipitate further requests for disclosure, which disclosure will continue to implicate communication between taxpayers, their independent auditors and taxpayers' tax counsel. The current lack of uniformity in handling tax accrual work papers in the federal courts can be expected to generate additional litigation with respect to work product and other privileges.<sup>103</sup> Taxpayers are likely to pursue strategies that preserve objections to summonses of tax accrual work papers.<sup>104</sup>

### G. Strategic Planning to Minimize Exposure

Tax practitioners have identified a number of tools that might be used by corporate taxpayers seeking to minimize examination risk and exposure. Among them are tax accounting method changes,<sup>105</sup> private letter ruling requests,<sup>106</sup> advance pricing agreements (entered into with U.S. or foreign tax authorities with respect to transfer pricing issues),<sup>107</sup> pre-filing agreements (which may include entry into a closing agreement covering as many as five tax years),<sup>108</sup> closing

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contingency – from employee discrimination suits to IP disputes.”). At least one commentator expresses concern that classification of some uncertain tax positions may be a de facto waiver of claims of privilege. See Froelich & Merritt, *supra* note 23.

102. Miller, *supra* note 68, at 1.

103. The strategic importance of the work product privilege is unmistakable. See Nolte, *supra* note 20.

104. Jean A. Pawlow & Kevin Spencer, *Adrift in a Sea of Uncertainty: Tax Accrual Workpapers Are Work-Product . . . But Showing Them to Your Auditor May Waive the Protection*, 61 TAX EXECUTIVE 33 (2009) (setting forth additional strategies for minimizing the risk of waiver of work product or similar privileges).

105. Miller, *supra* note 68. See also Filip, *supra* note 83 (recommending that some taxpayers consider a change of accounting method in 2010 to avoid having to book a reserve in 2010).

106. Miller, *supra* note 68. “For the week ending August 20, the IRS issued about 70 such [private letter] rulings. The letters are prospective legal determinations made by the IRS chief counsel’s organization; the fee for a letter is \$10,000 for most corporate taxpayers. (Prefiling agreements, which are IRS guidance, are applied to completed transactions and are based on existing law.)” See Nolte, *supra* note 20.

107. Miller, *supra* note 68.

108. Miller, *supra* note 68. “In addition, some of these same companies will try to eliminate uncertainty altogether, thereby doing away with the need to file a Schedule UTP. That can be accomplished by obtaining a pre-filing agreement or private-letter ruling from the IRS, two mechanisms the agency uses to rule on issues at the request of the taxpayer. Until now, pre-filing

agreements,<sup>109</sup> Limited Issue Focused Examination programs,<sup>110</sup> expedited closing of examination for previous years,<sup>111</sup> and participation in CAP.<sup>112</sup>

In rare cases, a taxpayer might minimize or avoid the obligation to file Schedule UTP by adopting a non-GAAP method of accounting.<sup>113</sup>

Some taxpayers who routinely create book reserves for tax items that present no credible risk of tax may find it advisable to track such risks in tax accrual workpapers without booking a reserve with respect

agreements, which were introduced in 2000, have been used sparingly. The program, which costs about \$50,000 to enter, was most popular in 2005, when 53 requests were made, 29 cases were accepted, and 19 agreements were closed. Last year only 28 requests were made, but participation may increase in light of the new disclosure rules, says Dolan [a former acting director at the IRS and currently national director of tax policies and dispute resolution at KPMG].” See Nolte, *supra* note 20.

109. Miller, *supra* note 68.

110. See generally I.R.M. § 4.51.3; IRS News Release, IR-2002-133 (Dec. 4, 2002), available at <http://www.irs.gov/newsroom/article/0,,id=104297,00.html>.

111. *Id.*; see Filip, *supra* note 83.

The practical implications will be that companies that have regular dealings with the IRS will address the issue head-on, while other companies may be pulled into government examinations for the first time, says Mike Dolan, a former acting director at the IRS and currently national director of tax policies and dispute resolution at KPMG. He says companies that are part of the IRS’s continuous examination program, for example, will ‘try to accelerate resolutions’ for 2010. That is, they will work with the IRS to settle older tax disputes, and then adjust 2010 tax positions to reduce uncertainty.”

See Nolte, *supra* note 20.

112. See Miller, *supra* note 68, at 6. But see Filip, *supra* note 83:

Often times, the old motto of ‘if you are taking a bath, you may as well fill the tub’ has led tax departments to attempt to fix every tax issue or problem, large or small, during a remediation exercise. In the past, there was no downside to this approach. Now, however, a more careful analysis may be warranted in order to avoid going overboard in attempting to correct a weakness or deficiency.

“Additionally, 29 percent of [October 2010 KPMG survey] respondents said that Schedule UTP will increase their interest in pre-filing treatments to achieve certainty around their uncertain tax positions, such as pre-filing agreements, advanced pricing agreements, and the compliance assurance process.” See I.R.S. Announcement 2010-9, 2010-7 I.R.B. 408 (Jan. 26, 2010).

113. One tax blogger explains the planning opportunity as follows:

I was talking to a CFO of a multinational company last week, telling him about the Schedule UTP. He made the comment that perhaps he would just switch to IFRS and not have to deal with this because his financials were not filed in accordance with U.S. GAAP. That’s not an option. The IRS thought of that. It doesn’t matter under which accounting standards the audited financials are issued; the Schedule UTP instructions refer to U.S. GAAP, IFRS or any other country-specific accounting standards. What he may have been thinking, and here he would have a valid point, is that a UTP required to be recorded under U.S. GAAP is not necessarily required to be recorded under IFRS. And generally, if it’s not recorded in the financial statements, it’s not reportable on Schedule UTP. That particular fact pattern, however, is rare.

*IRS Transparency Initiative Part II – It’s Revised* (Aug. 12, 2010), *TaxOps* (Aug. 12, 2010), <http://www.taxops.com/blog/category/accounting-for-income-taxes>; see also Nolte, *supra* note 20.



to them.<sup>114</sup> Others, who treat certain risks as ones they would litigate, may consider reclassifying such risks as immaterial to avoid having to report them.<sup>115</sup>

Some taxpayers may consider whether the FASB rules with respect to reporting have exposed them to additional risk with respect to their simplified treatment of the term “unit of account.” As one commentator notes, a multiplicity of meanings for this term might have provided taxpayers additional planning opportunities as they prepare Schedule UTP.<sup>116</sup>

As is the case with all areas of tax exposure, risk management may require a taxpayer to further examine its documentation of transactions to more fully establish the rationale for tax positions.<sup>117</sup> Tax advisors and risk management vendors can be expected to provide assistance in identifying areas for improved documentation and recordkeeping.<sup>118</sup>

114. Filip, *supra* note 83.

115. Filip, *supra* note 83; Malik, *supra* note 21.

116. See UTP INSTRUCTIONS, *supra* note 21, at 3. The commentator speculates as follows: Remember also how many of the audit firms were advocating the creation of an extensive list of units of accounts? Sanity prevailed, however, and few battles have been reported over the interpretation of this concept. As we see it, taxpayers have opted for a minimization of units of accounts. Looking back, we now wonder if that course may prove to be a complicating factor with the UTP disclosures. We have to wonder if taxpayers might rather want to create many units of account in order to avoid or minimize the need to designate any uncertainty as a “major tax position” as described in #6 above.

Filip, *supra* note 83.

117. As an example, a taxpayer might consider obtaining additional tax opinions in support of certain positions to buttress their legal underpinnings and avoid having to take additional uncertain tax positions.

4) Have you implemented, in 2010, an uncertain tax position that results from a transaction that relies on the advice of the tax professional that had a substantive role in shaping the transaction? The Tax Court sustained a Section 6662 accuracy-related penalty recently (see [A&M] Tax Advisor Weekly Issue 32), reasoning that the taxpayer did not act reasonably and in good faith as required by Section 6664 in order to be exempt from a 6662 penalty. The court believed that the tax advisor was not independent and therefore that the taxpayer could not rely on his advice in order to avoid the penalty. If this situation applies to you for a 2010 transaction, and you fail to secure another opinion, might your auditor require you to include penalties in your reserve calculation? While the dollar value of the penalty might not be a significant financial item for your balance sheet, it just might affect the ranking and the designation of “major tax position” you are required to disclose on the 2010 tax return.

118. Filip, *supra* note 83; see also Alston & Bird LLP, *IRS' Schedule of Uncertain Tax Positions Raises Concerns for Preserving Privilege*, FED. TAX ADVISORY, June 1, 2010, at 1-2, available at <http://www.alston.com/files/Publication/e5d91b1d-eb36-4bb7-bfd0-fad3075a83e7/Presentation/PublicationAttachment/1378c635-8a63-47bb-be03-fad3afe8f8b7/FedTaxReport%2006-1-2010.pdf> (“Caution should be exercised in determining what documents to prepare, when to prepare them, who should prepare them and how to minimize distribution of such documents.”). Tax professionals have expressed their concerns over how much information to provide:

Taxpayers may wish to consult with tax counsel as to ways in which in-house accounting and tax functions may be streamlined to produce consistent documentation for the independent auditor and tax authorities without waiving defensible privileges associated with interaction with outside tax counsel.<sup>119</sup> According to the IRS, streamlining reduces burdens associated with preparation of Schedule UTP.<sup>120</sup> This IRS guidance could prove self-serving.

As an example, the final Instructions for Schedule UTP require that taxpayers report uncertain tax positions for which they established no reserves due to the taxpayers' intent to litigate.<sup>121</sup> The final instructions clarify that taxpayers may rely on the reserve decisions they made for financial statement purposes to prepare Schedule UTP.<sup>122</sup> Thus, a taxpayer need not reassess at the time the schedule is completed those reserve decisions previously made for financial statement purposes. The final instructions do not state how a taxpayer documents an expectation to litigate a position. Announcement 2010-75 provides only that a taxpayer "would continue to document its decision in the same way as it substantiates any decision not to record a reserve in its financial statements."<sup>123</sup> As noted previously, the manner in which such items are treated may affect the maintenance of privilege.<sup>124</sup>

Privately held corporations that prepare GAAP financial statements, which have not been subject to FIN 48 and are not generally

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According to the survey of 1100 business leaders conducted in early October, 44 percent of respondents said their biggest concern was providing the concise description for a disclosed UTP, defined by the IRS as a federal income tax position for which a taxpayer or related party has recorded a reserve in an audited financial statement (or for which no reserve was recorded because of an expectation to litigate).

Press Release, KPMG, Executives Anxious About IRS Reporting Requirements for Uncertain Tax Positions Schedule, KPMG Survey Reveals (Oct. 24, 2010), available at <http://www.kpmg.com/US/en/IssuesAndInsights/ArticlesPublications/Press-Releases/Pages/Executives-Anxious-About-IRS-Reporting-Requirements-Uncertain-Tax-Positions-Schedule.aspx>. Miller, *supra* note 68, at 7.

119. "Claudine Pease-Wingenter, an assistant professor at the Phoenix School of Law and a former tax attorney with Exxon/Mobil, says it is 'critical' that tax accrual papers be prepared exclusively by licensed attorneys, with no more than minor clerical duties being delegated to non-attorneys, administrative assistants or paralegals." See Lindorff, *supra* note 101 (Professor Pease-Wingenter and others also suggesting that attorneys lace their written prognostications with citations to authority, show independent auditors summaries rather than full-fledged analysis, and supply oral statements if at all possible).

120. See Miller, *supra* note 68, at 7.

121. UTP INSTRUCTIONS, *supra* note 21, at 2.

122. UTP INSTRUCTIONS, *supra* note 21, at 1.

123. I.R.S. Announcement 2010-75, 2010-41 I.R.B. 428 (Sept. 24, 2010).

124. See *supra* notes 101-04 and accompanying text.

available to the IRS, may confront most of the foregoing issues for the first time as they prepare 2010 returns.<sup>125</sup>

## VI. CONCLUSION

This article, written in the months prior to many taxpayers' first filing of Schedule UTP, lacks even anecdotal reporting of how the largest of corporate taxpayers are responding to the IRS's new program that requires them to report in detail their uncertain tax positions, including, the relative ranking of such positions by type and dollar amount. While the IRS maintains that this new program exhibits restraint and does no more than formalize reporting of information screened and reported in the preparation of audited financial statements, it does call for unprecedented disclosure of vulnerability on tax issues. It also provides a roadmap for tax authorities (federal, state and foreign) to use in identifying taxpayers, returns, and issues review. Moreover, by requiring information as to the ranking of uncertain tax positions, the new program exposes information not discernible from financial statements, information arguably protected from disclosure by privilege, and information that, once reported, arguably waives privilege with respect to other privileged information.

The notion that such a program promotes transparency in the same way as independently audited financial statements promote transparency for investors ignores the fact that a shareholder and a tax authority do not benefit from transparency in the same way. A shareholder benefits from the type of transparency pursued by the SEC and FASB because it allows the shareholder to assess the risks and benefits of investment. A tax authority benefits from the type of transparency pursued by the IRS because it allows the tax authority to assess a taxpayer's vulnerabilities, its confidence with respect to positions taken, the relative dollar value of a concession with respect to an area in which the paucity of authority may be as much to blame for the taxpayer's vulnerability as its motivation for tax avoidance. The uncertain tax positions program does not accomplish transparency. Like the two-way mirror in the interrogation room at a local police station, it provides the tax authority clarity while concealing from the subject of examination the positions of the examiner.

The fact that everyone knows that the mirror is not also a window for the taxpayer does not alter the fact the program will subject many taxpayers pursuing legitimate tax planning objectives to examinations that must be suffered or avoided by the payment of fees and settle-

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125. BUTLER SNOW, *supra* note 13, at 1, 5-6.

ments that turn the tax examination process into a toll stop at which ability to pay may become more important than legal obligation to do so. Perhaps parties on both sides of the examination table would benefit from additional reflection on the issue of what is fairest for all.

