



American Institute of CPAs  
1455 Pennsylvania Avenue, NW  
Washington, DC 20004

December 2, 2010

The Honorable Douglas H. Shulman  
Commissioner  
Internal Revenue Service  
1111 Constitution Avenue, N.W.  
Washington, D.C. 20224

RE: Uncertain Tax Position Reporting

Dear Commissioner Shulman:

The American Institute of Certified Public Accountants (AICPA) respectfully submits this letter on the subject of the new “uncertain tax position” (UTP) reporting regime adopted by the Internal Revenue Service (IRS or Service). The AICPA is the national professional organization of certified public accountants comprised of approximately 360,000 members. Our members advise on federal, state, and international tax matters and prepare income and other tax returns for millions of Americans. They provide services to individuals, not-for-profit organizations, and small and medium-sized businesses, as well as America’s largest businesses.

Based on our review of the UTP guidance released on September 24, 2010, we commend the IRS for making changes that are responsive to the comments submitted by the AICPA and others that voiced reservations concerning the Service’s proposed UTP reporting regime as released earlier this year. The September 24, 2010 release of Announcements 2010-75 and 2010-76, the final Schedule UTP and accompanying instructions, and the Large Business and International (LB&I) Division directive to the field answer a number of concerns raised by the public about the earlier proposed program. The elimination of the maximum tax adjustment requirement and administrative practice UTP category are welcome changes that will improve the administration of the UTP disclosure initiative.

This letter highlights certain other changes that the Service may wish to consider as it continues to refine the UTP disclosure program going forward. We will address the following topics: (1) the universe of taxpayers required to file Schedule UTP; (2) duplicative reporting between Schedule UTP and other IRS schedules; (3) financial reporting system dynamic; (4) treatment of taxpayers in the Compliance Assurance Program (CAP) and taxpayers under continuous audit; and (5) e-filing issues associated with the new form. We have attached an appendix with a sample of specific issues relating to the Schedule UTP and instructions.

### **Narrowing the Initial Universe of Schedule UTP Filers**

The final Schedule UTP and instructions indicate that, initially, only taxpayers filing Form 1120, Form 1120-F, Form 1120-L, or Form 1120-PC will be required to disclose uncertain tax positions. We commend the Service for initially implementing the UTP requirements only with respect to large

corporate taxpayers and we are particularly pleased that the filing requirement was not expanded to cover tax-exempt entities and pass-through entities (i.e., partnerships and S corporations).

As we stated in our June 1, 2010 UTP comments, we urge the IRS to permanently exclude tax-exempt and pass-through entities from any UTP filing requirement. These entities generally are not subject to federal income tax, and we believe the associated compliance burdens outweigh the relative benefits of potential disclosure. The IRS's underlying policy objective that led to the creation of Schedule UTP (i.e., leveraging the taxpayer's financial statement disclosures as a factor that IRS considers during assessment of tax return risk) would not similarly extend to a pass-through entity, and any attempt to impose the UTP reporting requirements on such entities would create immense burden for taxpayers while failing to produce the benefit that the IRS seeks through imposing Schedule UTP in the corporate environment.

We are pleased that Announcement 2010-75 further narrows the universe of Schedule UTP filers by implementation of a five year phase-in of the Schedule UTP for corporations with total assets under \$100 million. The announced phase-in is as follows: For 2010 and 2011 tax years, corporations with total assets of \$100 million or more are required to file Schedule UTP; for 2012 and 2013 tax years, the threshold will be reduced to \$50 million or more in total assets; and further reduced to \$10 million or more in total assets for 2014 and future tax years.

The AICPA strongly recommends that the Service maintain the threshold on a permanent basis at the level of \$100 million in total assets for corporations; or as a less preferable alternative, reduce the Schedule UTP filer threshold (on a permanent basis) to corporations with total assets of \$50 million or more. Our June 2010 comments recommended that the UTP reporting requirements only apply to large taxpayers. In those comments, we recommended a conjunctive test under which only taxpayers that had total assets of in excess of \$50 million and annual gross receipts in excess of \$100 million be subject to the UTP reporting requirement. A permanent, but significantly higher UTP reporting threshold (i.e., substantially higher than \$10 million) would recognize that small, privately held entities are especially concerned about the burdens attendant to the obligation to file Schedule UTP, including increased costs of both financial statement audits and tax return preparation.

### **Duplicative IRS Reporting Requirements**

In our June 2010 comments, we noted that the IRS already requires taxpayers to file a number of forms or schedules involving disclosure, including Schedule M-3 for corporate, partnership, and S corporation taxpayers, Form 8886 for reportable transactions, the Form 8275 disclosure statement, and the Form 8275-R regulation disclosure statement. While we offered this comment in June based on the notion that the IRS should make better use of the array of disclosure forms and schedules it currently requires of the public, we are pleased that the Service has eliminated the need to file a Form 8275 or Form 8275-R for those positions that are disclosed on the Schedule UTP. Nevertheless, we reiterate our recommendation that the IRS seek ways to alleviate the need for disclosure of the same information on Schedule UTP that is required to be disclosed on other forms and schedules. In this context, we commend the IRS for creating a working group to study and revise Schedule M-3, Net Income (Loss) Reconciliation for Corporations for Total Assets of \$10 Million or More, to reduce duplicative reporting. We encourage the IRS to expand the jurisdiction of the working group to also look at any potential

duplicative reporting resulting from taxpayer reporting on Form 8886. The AICPA stands ready to work with this IRS working group on minimizing duplicative reporting on IRS forms and schedules.

### **Schedule UTP Reporting and Financial Reporting**

We are pleased that the IRS has adopted a number of positions in its final instructions for Schedule UTP which we believe mitigate the concern expressed in our June 2010 comments that the IRS proposal overlaid a tax disclosure construct on the financial reporting system that would potentially introduce a dynamic that we feared would work at cross purposes with the original and fundamental purposes of the reporting rules. First, the IRS's final instructions for Schedule UTP state that corporations will not be required to report tax positions that would be considered immaterial under applicable financial reporting standards or are sufficiently certain so that no reserve would otherwise be required under such standards. Second, we are pleased that the IRS has excluded "compiled or reviewed" financial statements from the definition of audited financial statements, thereby eliminating these types of financial statements from any related disclosures on Schedule UTP. Third, we are pleased that the IRS issued Announcement 2010-76 regarding the IRS examination function's approach to requests for workpapers, as there are legitimate concerns held by taxpayers that maintaining respect for the treatment of privileged communications facilitates transparency in reporting.

### **Compliance Assurance Program (CAP) and Taxpayers Under Continuous Audit**

The AICPA supports the IRS's pronouncement, as revealed in Announcement 2010-75, that the Service will be expanding the Compliance Assurance Program and making it permanent. We would urge the Service to expand the program as much as possible and make its benefits available to many more taxpayers. We hope the IRS pronouncement indicates that the Service intends to increase taxpayer eligibility for the program; and for current CAP participants, identify ways to reduce resources and taxpayer contact by the IRS where appropriate. However, by failing to exclude CAP taxpayers from the UTP reporting requirement, we believe the Service has missed an opportunity to properly apply resources and reduce unnecessary taxpayer burden with respect to current year filings. Moreover, taxpayers that are part of the CAP program, by virtue of their acceptance into CAP, have agreed to a level of transparency with respect to potential tax return positions. Inasmuch as the CAP program itself requires contemporaneous disclosure of all significant tax positions and a post-CAP affirmation that all material positions have been addressed, we continue to urge the Service to exempt CAP taxpayers from the requirement to prepare Schedule UTP. At a minimum, we suggest the IRS consider, as part of any guidance relating to the expanded CAP, including a section regarding how the IRS plans to integrate the Schedule UTP into the various phases of CAP (i.e., taxpayers under evaluation for inclusion in CAP versus taxpayers actively engaged in negotiation with the IRS during CAP).

For Coordinated Industry Case (CIC) taxpayers that are under continuous audit, their returns are examined regardless of the information provided on Schedule UTP. Also, with respect to this class of taxpayers, the Service would still be able to meet its objectives of transparency and increased compliance by collecting information concerning UTPs at the opening conference for the year under examination in lieu of the pending UTP reporting requirements. The IRS should continue to consider whether such taxpayers should be exempted from the requirement to submit Schedule UTP with the taxpayers' annual tax returns. We also urge the IRS to address how the IRS planned "triage" teams will

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impact the CIC program. For example, would the “triage” take the form of an independent person directing the CIC examination team whether or not certain issues should be raised or directing how they will be handled?

### **E-Filing Issues Associated with the Schedule UTP**

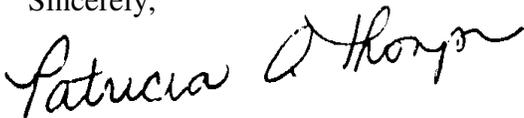
To date, our members do not have experience with filing the Schedule UTP with the affected returns. It is important that the IRS ensure that the information that preparers and taxpayers enter on Schedule UTP based on the instructions is identical to that included on the corresponding extensible markup language (XML) schema to avoid any concerns about the form being properly completed upon submission of e-File packages. AICPA will continue to work with IRS to identify discrepancies that may pose a problem.

### **Conclusion**

In summary, we clearly support the overarching goals of certainty, consistency and efficiency, which the IRS promotes with respect to its UTP reporting regime. While we are supportive of many of the modifications to the UTP program that the Service announced on September 24, 2010, we continue to note that the program (when fully phased-in) will still fall heavily on a universe of taxpayers already challenged to timely meet the far-reaching demands of financial statement and tax return processes. To that end, we respectfully encourage the IRS to give further consideration to recasting the initiative to affect fewer taxpayers.

If you would like to discuss this matter in more depth or have any questions, please contact Michael P. Dolan, Chair of the AICPA Tax Position Disclosure Task Force, at [mpdolan@kpmg.com](mailto:mpdolan@kpmg.com), or (202) 533-6150; or Benson S. Goldstein, AICPA Senior Technical Manager, at [bgoldstein@aicpa.org](mailto:bgoldstein@aicpa.org), or (202) 434-9279.

Sincerely,



Patricia A. Thompson  
Chair, Tax Executive Committee

Enclosure: Appendix

**AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS**

**APPENDIX**

**COMMENTS ON UNCERTAIN TAX POSITION REPORTING**

**SUBMITTED TO THE IRS**

**December 2, 2010**

**Specific Issues Regarding the Final Schedule UTP and Instructions**

The following questions regarding the final Schedule UTP and its instructions are a sample of the issues presented by the final guidance. These issues demonstrate the complex judgments that taxpayers will need to make in the first year of filing Schedule UTP. Regarding these and other gray areas in the filing requirements, we are concerned with statements made by various government officials that the IRS will be carefully evaluating the sufficiency of the filings where no similar filing obligation has been imposed previously. The IRS should evaluate the first year filings by taxpayers and provide feedback regarding issues that need further clarification in order to facilitate taxpayers' compliance with the schedule's requirements.

Reporting of similar positions on same line item of Schedule UTP filed by consolidated group member. Additional clarification is necessary regarding whether similar positions may be combined on a single line item on Schedule UTP. For example, with respect to a company filing a consolidated tax return for a large number of affiliated or related corporate entities, there are likely to be many tax positions at multiple affiliates that are similar enough that the reporting taxpayer would prefer to reduce burden by grouping like items on a single line item on the Schedule UTP (e.g., transfer pricing, research credit, domestic production activities deduction, etc.). Additional guidance regarding the proper unit of account may be helpful to this analysis.

Ranking timing items. Additional clarification is necessary regarding the proper method of ranking a tax position when the uncertainty relates to temporary differences (e.g., timing items). For example, under U.S. generally accepted accounting principles (GAAP), when a taxpayer accounts for an uncertain tax position related to certain items of income/expense that will properly enter into both the measure of book income and taxable income (sometimes referred to as timing items), the uncertain tax position may impact several financial statement accounts, such as (1) an entry to reflect the impact on the income taxes payable/receivable; (2) an entry to reflect the impact on one or more deferred tax assets/liabilities ((1) and (2) may or may not be equal amounts but are generally offsetting in direction); (3) interest; and (4) penalties. It is unclear whether the size of the position for purposes of ranking (and designating Major Tax Position) should reflect the net amount of all impacted financial statement accounts, or some other amount such as the total amount of the unrecognized tax benefit disclosed in the tabular reconciliation plus interest and penalties. There is also a general question regarding inclusion of interest and penalties in the size of the issue as there appears to be a discrepancy between the instructions (which discusses size as the reserve recorded for tax) and Announcement 2010-75 (which discusses size of the basis of tax, interest and penalties.) Also, the IRS should consider whether interest should be included in the calculation of size where by the taxpayer does not ordinarily calculate interest issue by issue, but instead on the net taxable income change by year, for financial statement purposes.

Treatment of amended returns. Additional clarification is necessary regarding filings with amended returns. The instructions indicate Schedule UTP must be filed with a protective Form 1120 if the four requirements of “who must file” are satisfied. Does filing an amended Form 1120 require including a copy of a previously filed Schedule UTP, filing of an amended Schedule UTP, or no additional reporting of items required to be reported on Schedule UTP? If the IRS believes a copy of the Schedule UTP should be appended to the amended return, would this be limited to circumstances where the amended return relates to the item reported on the Schedule UTP? At a minimum, we do not believe that Schedule UTP should be required to be filed where the items reflected on the amended return do not relate to the items listed on the previously filed Schedule UTP.

Designation of transfer pricing items through coding. Explanation should be provided regarding why transfer pricing items should be specifically denoted with a “T” as opposed to every other item which the final instructions provide should be denoted with a “G.” The IRS has the ability to sort through the information provided by code section, and there is a concern that the special designation for transfer pricing documentation could signify a larger effort to target these items specifically for scrutiny. We suggest that the IRS consider eliminating the “T” and “G” distinctions in order to reduce the potential for taxpayer error in preparation of the Schedule UTP, in particular as this information is redundant in light of the ability of the IRS to sort by Internal Revenue Code section.

Guidance regarding Part II. Additional guidance should be provided with respect to future years requiring reporting of prior year positions. Although a couple of examples were included in the final instructions that demonstrate reporting over multiple years, additional guidance is needed on what should be reported in Part II of the form for tax years after 2010.

Meaning of “recorded a reserve.” Additional clarification is necessary regarding when a taxpayer has “recorded a reserve” from the perspective of the IRS. It is clear that the first condition that must be satisfied for a tax position to be required to be reported on Schedule UTP includes a tax position taken *for the current tax year or for a prior tax year*. For a tax position for which a reserve is recorded, additional clarification is needed whether the second condition that must be satisfied for a tax position to be required to be reported on Schedule UTP is meant to be limited to reserves recorded in the current year or is meant to include both reserves recorded in the current year and any prior year. The discussion below further explains the need for additional clarification.

The final instructions provide the following on page 1 (*emphasis added*):

**Tax positions to be reported.**

Schedule UTP requires the reporting of each U.S. federal income tax position taken by an applicable corporation on its U.S. federal income tax return for which two conditions are satisfied.

1. The corporation has taken a tax position on its U.S. federal income tax return for the current tax year or for a prior tax year.
2. Either the corporation or a related party has recorded a reserve with respect to that tax position for U.S. federal income tax in audited financial statements, or the corporation

or related party did not record a reserve for that tax position because the corporation expects to litigate the position.

It is clear that the first condition that must be satisfied for tax positions to be reported on Schedule UTP includes taxes positions taken *for the current tax year or for a prior tax year*.

The following examples provided in the final instructions are not entirely clear regarding, for tax positions for which a reserve is recorded, whether the second condition that must be satisfied for a tax position to be required to be reported on Schedule UTP is meant to be limited to reserves recorded in the current year or is meant to include both reserves recorded in the current year and any prior year. For example, Example 6 appears to indicate that a tax position taken in a current year is required to be reported on Schedule UTP only in the year the reserve is recorded. The example sets forth a fact pattern wherein a tax position is taken in 2010 to deduct 100% of an expenditure for which it is uncertain if the expenditure should instead be amortized over five years (2010-2014). The example provides: (1) a tax position is taken in each of the 5 years because, on each year's tax return, there would be an adjustment to a line item on that return if the position taken in that year's return is not sustained, and (2) the corporation did not record a reserve for any of the positions taken in tax years 2011 through 2014. The example concludes that "none of the 2011 to 2014 tax positions must be reported on Schedule UTP because the corporation did not record a reserve with respect to any of those positions." In this fact pattern, it is not clear whether the reason that reporting on Schedule UTP is required only in 2010 relates to the fact that the corporation did not record a reserve *in* years 2011-2014 (rather it recorded the reserve in 2010). An alternative reasoning would suggest that reporting on Schedule UTP is required only in 2010 because 2010 is the only year for which a position increases a reserve (the 2011-2014 tax positions would, in theory, reduce a reserve).

This issue is also highlighted by Example 7 which appears to indicate that a tax position taken in a current year is required to be reported on Schedule UTP regardless of whether the reserve is recorded in the current year or in a prior year. In this example, an expenditure taken in 2010 is amortized over five years on the tax return. The example concludes that the tax positions taken in all years from 2010 to 2014 must be reported on the Schedules UTP filed with the tax returns for the respective years, and further indicates that the conclusion would be the same even if the entire reserve for all of the 2010-2014 tax positions is recorded in 2010 and no reserve is recorded in 2011-2014.

Assuming the same fact pattern as Example 7, but instead the corporation recorded the reserve in 2014, it would appear that the tax position would be reported on Schedule UTP for tax year 2014 and not on Schedule UTP filed for tax years 2010-2013, because the corporation has *not yet* recorded a reserve during those years. Furthermore, would reporting in Part II of Schedule UTP for tax year 2014 be required for the deductions claimed on the tax returns for years 2010-2013 since these are positions taken in a prior year's tax return?

Example 9 also raises this question. Example 9 concludes that a deduction taken in 2010 that increases a net operating loss (NOL) carryforward does not need to be reported in 2010 because "the corporation did not record a reserve with respect to the tax position taken in 2010." Generally, under U.S. GAAP, such an uncertain tax position would be reported in the financial statements in 2010 by means of recording a lower deferred tax asset (DTA) in the financial statements as compared to the NOL reported on the tax return, as well as disclosing an increase in the tabular reconciliation disclosure of total unrecognized tax benefits in the footnotes to the financial statements. For financial statement purposes, the 2011 utilization of the NOL would not result in any increase or decrease in total unrecognized tax

benefits in the tabular reconciliation – i.e., no additional reserve has been recorded in 2011. This example seems to imply that a tax position taken in a current or prior year is required to be reported on Schedule UTP only in the year the reserve is recorded, or that a “reserve is recorded” only when the tax position impacts the cash tax liability.

Assuming the same fact patterns as Example 9, but instead the corporation recorded a reserve in 2010 and not 2011, it is not clear whether (1) the corporation would be required to report that tax position on Schedule UTP only in 2010 because the reserve was recorded only in 2010, or (2) the corporation would be required to report the tax positions on Schedule UTP in both 2010 and 2011 because a tax position was taken in both years and a reserve was recorded in *either* a current *or* prior year (albeit the same “reserve” for both tax positions), or (3) the corporation would still be required to report that tax position on Schedule UTP only in 2011 because that is the only year the cash tax liability is impacted and, therefore, that is the only year for which a “reserve is recorded” as that term is intended to be defined for purposes of Schedule UTP.