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1200 G Street, N.W., Suite 300
Washington, D.C. 20005-3814
202.638.5601
tei.org

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Internal Revenue Service
1111 Constitution Avenue NW
Washington, D.C. 20224

Via Email: lbi.utp.communications@irs.gov

RE: Comments on Proposed Changes to Schedule UTP

Dear Sir or Madam:

On October 11, 2022, the IRS announced draft changes to Schedule UTP and its instructions for the 2022 Tax Year. We appreciate this opportunity to comment on the IRS's proposal. Tax Executives Institute ("TEI") members manage the tax affairs of their companies.[1] They are involved in all areas of tax laws related to business enterprises and also apply financial accounting standards to evaluate the uncertain tax positions ("UTPs") for which reserves may be recorded in corporate financial statements. TEI members therefore have a vested interest in engaging constructively with the IRS on this issue.

As a general matter, TEI agrees that transparency benefits the tax system and has supported initiatives undertaken by Congress, the IRS, and the SEC to promote greater transparency and corporate accountability. TEI has long supported enhanced disclosure regimes that help the IRS identify and analyze potentially abusive transactions. In addition, TEI members wholly agree that efficiency, certainty, and

[1] TEI was founded in 1944 to serve the needs of business tax professionals. It is organized under the Not-For-Profit Corporation Law of the State of New York and is exempt from U.S. Federal Income Tax under section 501(c)(6) of the Internal Revenue Code of 1986, as amended. Today, the organization has 57 chapters in North and South America, Europe, and Asia. Our nearly 6,000 individual members represent over 2,900 of the leading companies around the world. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting sound tax policy, as well as the fair and efficient administration of the tax laws, at all levels of government.

consistency are inarguable goals for sound tax administration. Despite our alignment with these goals, we have significant concerns with the changes the IRS is proposing to Schedule UTP, as well as the rushed manner in which it seeks to implement the proposed changes.

Our comments address the procedural aspects of rolling out this profound change in IRS policy and engagement, as well as substantive aspects of the proposed Schedule UTP changes. Our aim is to illustrate that there is more at stake here than the reporting of ordinary course tax data to the IRS. Schedule UTP lies at the complex intersection of financial reporting and taxation. The two systems have their own rules and objectives, but they do not operate in a vacuum. Schedule UTP reporting coupled with the contentious nature of tax examinations is inherently at odds with the conservative nature of financial accounting principles. The proposed changes to Schedule UTP raise a host of critical policy issues that must be evaluated in a thoughtful and deliberative manner. Accordingly, TEI urges the IRS to put an indefinite hold on the proposed changes to Schedule UTP and engage in a meaningful collaboration with stakeholders to identify reasonable alternatives for addressing the issues the IRS is seeking to address through these changes.

Procedural Comments

At their core, the proposed Schedule UTP changes are a material shift, if not a reversal, of the IRS policy to engage with affected taxpayers in a robust and deliberative manner. The fast-track approach the IRS is taking today is directly contrary to the agency's past practice. Providing stakeholders little more than a month's time to offer input on the major policy shift reflected by the proposed changes is inadequate, and the stated reason for proposing the changes does not include details necessary for stakeholders to propose and evaluate possible alternatives.

While this area was thoroughly vetted in 2010, revisiting Schedule UTP, and more broadly, disclosures of UTPs, thirteen years later justifies more deliberative engagement to understand the ongoing concerns of both the IRS and taxpayers. Taxpayers vastly appreciated the IRS's sensitivity and thoughtfulness launching and then expanding the comment process in 2010, and the same care and diligence should be afforded to taxpayers in 2022.

In 2010, TEI was actively involved in the deliberations underlying the IRS's adoption of Schedule UTP. Despite our reservations concerning the new reporting requirement, we commended the more than five-month process the IRS employed in seeking feedback, responding to taxpayer concerns, and evincing a

willingness to consider alternative approaches. The cadence from inception to adoption of a final UTP reporting form occurred as follows:

- On **January 26, 2010**, in Announcement 2010-9,[2] the IRS announced it was developing a schedule to require certain taxpayers to report UTPs on tax returns. The initial comment period spanned from late January 2010 until March 29, 2010.

- On **March 5, 2010**, the IRS released Announcement 2010-17 following up on the proposed Schedule UTP issue, observing that:[3]

  > Since [releasing Announcement 2010-9], the Service has received a number of questions and comments on the proposal. Several informal comments asked the Service to clarify whether taxpayers will be required to file the new schedule with returns relating to 2009 tax years and whether a draft schedule and instructions will be released. Other comments asked for clarification regarding the scope and implementation of the proposal, such as its application to pass-through entities and tax-exempt entities, and potential duplication of reporting with disclosures made on other forms (such as the Form 8275, Disclosure Statement, and the Form 8275-R, Regulation Disclosure Statement). Some informal and written comments also asked for an extension of the comment period for up to 60 days to allow sufficient time to study the proposal and analyze its impact.

  In response to the flurry of taxpayer questions and comments, the IRS acknowledged the need for a deeper dive and more engagement on the issue. Specifically, "to allow taxpayers and practitioners the opportunity to provide comprehensive comments both on the proposal and on the implementing schedule and instructions, the time for submitting comments in response to Announcement 2010-9 is extended to June 1, 2010."[4] The initial three-month comment period was extended to over five months from the initial release of Announcement 2010-9, with the IRS recognizing the need for further review and comment in releasing the forthcoming Schedule UTP and instructions.

- On **April 19, 2010**, the IRS released a draft Schedule UTP with instructions in Announcement 2010-30.[5] The comment response date remained June 1, 2010, just over five weeks after the draft Schedule UTP and instructions were released.

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[2] 2010-7 I.R.B. 408 (Jan. 26, 2010).
[3] 2010-13 I.R.B. 515 (Mar. 5, 2010).
[4] *Id.*
[5] 2010-19 I.R.B. 668 (Apr. 19, 2010).

- On **June 1, 2010**, the Schedule UTP comment period closed, 125 days after the IRS first announced a potential Schedule UTP was in the works in Announcement 2010-9, and 43 days after having released the actual draft Schedule UTP and instructions for public review and comment.

- On **September 23, 2010**, the IRS released the final Schedule UTP and instructions in Announcement 2010-75 and its updated policy of restraint in Announcement 2010-76.[6] Notably, the IRS continued to revise the Schedule UTP FAQs for years after releasing them.

In revisiting Schedule UTP in 2022, the period of review and comment is a mere 38 days – from October 11 through November 18, 2022. Even if one considers the comment period comparable to that from when the IRS released Announcement 2010-30 to when the comment period closed (i.e., 43 days), taxpayers in 2010 had months of consideration already underway from when the IRS signaled a new Schedule UTP was in the works in January 2010.

The inadequacies of the contemplated 2022 timeframe are further demonstrated by an IRS official's remarks at a recent tax conference that indicated certain of the proposed changes were misleading and did not reflect the IRS's intent.[7] These remarks were made less than three weeks before the close of the IRS's comment period on the draft schedule. The timing of the IRS's release of draft Schedule UTP and short comment period appears solely motivated to meet internal IRS publication deadlines for completing forms for the 2022 filing season. The IRS has offered no rationale to support the urgency in which it seeks to push through these proposed changes to Schedule UTP. We respectfully submit that this effort is the antithesis of sound tax administration and urge the IRS to take a step back and engage in a meaningful process of evaluating the benefits and detriments of the proposed changes to Schedule UTP, as it did in 2010 when Schedule UTP was adopted.

Substantive Comments

If the IRS proceeds at the contemplated pace and implements the proposed changes for taxable year 2022, revised Schedule UTP would likely increase tax disputes—not lessen them—and distract from the efficiency and effectiveness of audits—not improve them, for the following reasons:

1. The depth, breadth, and detail required to comply with the proposed Schedule UTP filing requirements have already been thoroughly vetted and rejected as demonstrated by the robust administrative record from 2010.

2. The proposed Schedule UTP expansion eradicates the IRS's policy of restraint, a many-decades long policy which acknowledges the inherent sensitivities in having to disclose

[6] 2010-41 I.R.B. 428 and 432 (Sept. 24, 2010).
[7] *See* Kristen A. Parillo, 'Misleading' Instruction for Draft Schedule UTP to Be Clarified, 2022 Tax Notes Today Federal 211-1 (Nov. 2, 2022) ("IRS Official's November 2 Remarks").

information contained in accounting workpapers that are prepared to evaluate and reserve for exposures relating to UTPs under the financial accounting rules.

3. The proposed Schedule UTP expansion will increase disputes over legal privileges and protections long-afforded parties in controversies.

4. The proposed expanded disclosure for taxpayers to identify non-binding, non-legal authorities that are "contrary" to a UTP is an overreach by the IRS that ignores the well-founded principles of binding precedent, raises privilege concerns, and invites unnecessary and unproductive compliance disputes.

5. Requiring amounts and tax return line-item disclosures in the proposed Schedule UTP creates the very same concerns voiced by commenters in 2010, creating privilege concerns, requiring Herculean efforts to identify and trace the amounts throughout thousands of pages of tax returns and supporting workbooks, and creating computational issues the burdens of which outweigh the perceived benefits of the enhanced disclosures.

6. The intersection of the Proposed Schedule UTP and amended returns results in confusion and creates a substantial administrative burden for taxpayers.

1. Commentary that resonated with the IRS when it refined the proposed and final Schedule UTP in 2010 continues to apply today.

The proposed changes to Schedule UTP would add five columns to the form, requiring taxpayers to report for each of their UTPs:

- Column (c) — any Revenue Procedure, Revenue Ruling, Private Letter Ruling, Technical Advice Memorandum, Notice, court decision, Chief Counsel Advice, Field Service Advice, or General Counsel Memorandum that is contrary to the tax position;
- Column (d) —any Treasury Regulation that is contrary to the tax position;
- Column (i) — the location of the tax position by form or schedule;
- Column (j) — the location of the tax position by line number; and
- Column (k) — the incremental amount included on the line related to the tax position.

The draft Schedule UTP instructions (the "Proposed Instruction Revisions") expand the components of what is considered adequate disclosure of the concise description of a UTP and add two new, comprehensive examples. Under the proposal, the requirement to provide a concise UTP description has ballooned from "a description of the relevant facts affecting the tax treatment of the position and

information that can reasonably be expected to apprise the IRS of the identity of the tax position and the nature of the issue"[8] to a detailed analysis that requires disclosure of:[9]

- a description of the relevant facts affecting the tax treatment of the position;
- information that apprises the IRS of the identity of the tax position;
- information that apprises the IRS of the amount of the tax position;
- information that apprises the IRS of the unit of account;
- information that apprises the IRS of the nature of the controversy or potential controversy;
- "all" information pertaining to the nature, amount, or timing of the tax position uncertainty;
- additional technical details concerning the identity of the tax position; and
- a detailed description of the legal issues presented by the facts.

The proposed revisions to Schedule UTP in 2022 raise the very same issues that were raised when Announcement 2010-75 was issued in 2010. The IRS's deliberations and decisions made in 2010 continue to resonate today. In Announcement 2010-75, the IRS was circumspect about the volume and content of comments received from industry and practitioners on the proposed Schedule UTP:

> The Service received a large number of comments on the overall proposal, including whether and how the Service should implement the requirement to file a schedule reporting uncertain tax positions, as well as the draft schedule and instructions released for comment on April 19, 2010. Many of the comments expressed concerns regarding how the Service would use the reported information, the interaction of the new reporting requirement with the existing policy of restraint, the additional burden the reporting requirement would place on affected corporations, and the impact the reporting requirement would have on the relationship between the corporation and the Service or the corporation and its advisors or independent auditors.

In response, the IRS carefully considered all of the comments and made changes to its original proposal in developing the final schedule and instructions.

Detailed disclosure requirements such as those reflected in the proposed changes were ultimately omitted from the final form because they would subsume the very core of taxpayers' tax accrual workpapers, thereby causing friction with the financial accounting rules and raising privilege issues. It is inappropriate to use Schedule UTP as an administrative tool to require disclosure of privileged information. Accordingly, we urge the IRS to retain the reasoned meaning of concise description that it adopted in 2010 after significant stakeholder input and deliberation and abandon the current rushed proposal to delve further into the reasoning and legal analysis contained in tax accrual workpapers.

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[8] Instructions for Schedule UTP (Form 1120) (Rev. December 2019) at 6.

[9] Proposed Instruction Revisions at pages 7-8.

The IRS has not identified any reasons that justify ignoring the 2010 administrative record and adopting a new Schedule UTP that reverses reasoned and well-documented judgments made in 2010. In its October 11, 2022, announcement of proposed changes to Schedule UTP, the IRS stated, "the draft changes to Schedule UTP and instructions will improve the form's usefulness."[10] An IRS official subsequently indicated that many taxpayer descriptions of UTPs are insufficient and unhelpful, requiring the issuance of "soft letter" follow-up to about 38% of Schedule UTP filers for 2019.[11] This rationale indicates that the IRS's problem with existing Schedule UTP is actual or perceived non-compliance with the existing form requirements, not with the information requested in the form. The IRS should evaluate or share their evaluation of the effectiveness of soft letters in improving compliance with the current form UTP before implementing a vastly expanded filing requirement. This additional step would allow stakeholders to offer input on less burdensome alternatives.

2. The proposed changes to Schedule UTP would reverse the IRS's decades-old policy of restraint.

UTP disclosures lie at the complex intersection of financial reporting and taxation, both of which have their own rules and objectives. FASB Accounting Standards Codification Subtopic 740-10 ("ASC 740-10") provides the accounting rules for recognizing and measuring income tax positions taken or expected to be taken in a tax return.[12] Information subject to Schedule UTP reporting is derived from ASC 740-10 workpapers (commonly referred to as, tax accrual workpapers), and such information requires the application of significant judgment and legal analysis. ASC 740-10 requires companies to evaluate all material income tax positions taken in tax returns filed for taxable years that remain open under applicable statutes of limitation, as well as positions expected to be taken in returns filed in future taxable years.[13] In doing so, a company must conduct the following two-step analysis for every material position.

Recognition step. The company must determine if it is more likely than not (a greater than 50% probability), based on the technical merits, that the position will be sustained after a review by the tax authorities.[14] In making the assessment, the technical merits of the position are assessed by applying all known sources of authority to the facts and circumstances of the tax position, taking into account past

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[10] IRS Statement about Uncertain Tax Positions (UTP) Reporting (Oct. 11, 2022), *available at* https://www.irs.gov/newsroom/irs-statement-about-uncertain-tax-positions-utp-reporting.

[11] *See* IRS Official's November 2 Remarks, supra note 7. These statements were repeated at a subsequent tax conference at which the IRS official commented, '"[o]ur experience has been that many current UTP descriptions are insufficient and unhelpful, and as a result, we have to do a soft letter follow-up' to obtain necessary information. For the 2019 filing year, nearly 40 percent of UTP submissions were deficient." Chandra Wallace, Requiring More Detail on UTPs May Mean Fewer Companies Disclose, 2022 Tax Notes Today Federal 218-2 (Nov. 11, 2022).

[12] ASC 740 incorporates most of former FASB Interpretation No. 48, Accounting for Uncertainty in Income Taxes, commonly referred to as FIN 48.

[13] *See* ASC 740-10-10.

[14] ASC 740-10-25-6.

administrative practices and precedents of the relevant taxing authority in its dealings with the entity, as well as widely known practices and precedents that have been applied to similar entities.[15] It is also presumed that the tax position will be examined by a taxing authority that has full knowledge of all relevant information, and each individual tax position is evaluated on its own merits without consideration of the possibility of offset or aggregations with other positions.[16] The appropriate unit of account for determining what constitutes an individual tax position and whether the more-likely-than-not recognition threshold is met for a tax position are "matters of judgment based on the individual facts and circumstances of that position evaluated in light of all available evidence."[17]

If a position is determined to have a 50% or lower likelihood of being sustained, the company cannot reflect any of the tax benefit provided by the position in its current financial statements, and the company must establish a tax accrual for 100% of the estimated uncertain tax liability. Otherwise, if a company determines that the likelihood of sustaining the position is greater than 50%, it moves to the next step in the ASC 740-10 analysis, the measurement step.

Measurement step. If a tax position satisfies the recognition threshold, the position is measured to determine the largest amount of tax benefit that is greater than 50% likely of being realized upon settlement with a tax authority.[18]

In 1981, the IRS announced its policy of restraint, detailing that the IRS would seek taxpayer disclosure of accountant tax accrual workpapers only in "unusual circumstances."[19] The policy was not only relied upon by taxpayers and their independent auditors, but also cited with approval by the U.S. Supreme Court, which recognized the IRS's "administrative sensitivity" to "the intrusiveness of demands for the production of 'tax accrual workpapers.'"[20] In 2002, the IRS broadened the situations in which it would seek access to tax accrual workpapers, but limited such action to specific circumstances.[21] The IRS again modified its longstanding policy of restraint in 2010 when it adopted Schedule UTP, but it did so cautiously and in coordination with ultimate decision made for Schedule UTP disclosures. After "careful consideration" of taxpayer concerns, the IRS decided not to require reporting of the UTP amount and not to require reporting of the rationale and nature of uncertainty of UTPs.[22]

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[15] ASC 740-10-25-7.
[16] *Id*.
[17] *Id*.
[18] ASC 740-10-30-7.
[19] *See* Internal Revenue Manual ("IRM") § 4024.4 (1981).
[20] *United States v. Arthur Young & Co.*, 465 U.S. 805, 820-21 & n.17 (1984).
[21] *See* Notice 2002-63, 2002-2 C.B. 72; IRM § 4.10.20 (2002) (tying such requests to whether the taxpayer engaged in one or more listed transactions).
[22] *See* Announcements 2010-75 and 2010-76.

Under the IRS's current policy of restraint, if a document is otherwise privileged under the attorney-client privilege, the Code section 7525 tax advice privilege, or the work product doctrine and the document was provided to an independent auditor as part of an audit of the taxpayer's financial statements, the IRS will not assert during an examination that privilege has been waived by such disclosure. Accordingly, taxpayers may redact the following information from any copies of tax reconciliation workpapers they are asked to produce during an examination:[23]

- Working drafts, revisions, or comments concerning the concise description of tax positions reported on Schedule UTP.
- The amount of any reserve related to a tax position reported on Schedule UTP.
- Computations determining the ranking of tax positions to be reported on Schedule UTP or the designation of a tax position as a Major Tax Position.

The changes the IRS is proposing to Schedule UTP contradict the IRS's measured decisions made in 2010 and are inconsistent with the IRS's longstanding policy of restraint, which recognizes the "impact the [Schedule UTP] reporting requirement [has] on the relationship between the corporation and the Service or the corporation and its advisors or independent auditors."[24] If adopted, the proposed changes would place inappropriate pressure on a financial reporting system that demands conservative reporting of tax expense and may have unintended consequences. The IRS has provided no basis for the proposed changes other than the "draft changes to Schedule UTP and instructions will improve the form's usefulness." This vague rationale does not acknowledge and disregards all of the dialogue, thinking, and decisions that resulted in the IRS eliminating UTP amounts from the Schedule UTP adopted in 2010 and limiting the concise description required in the form.

Further, a meaningful comment period on the proposed changes is not possible without a more thorough explanation of why the IRS believes it is necessary to alter materially its policy of restraint, how the new information will be used to advance tax administration, how the IRS intends to handle assertions of privilege over the requested information, and steps the IRS will take to ensure examiners have proper guidance on how the information is to be utilized. Accordingly, TEI urges the IRS to put an indefinite hold on the proposed changes to Schedule UTP and engage in a meaningful collaboration with stakeholders to identify reasonable alternatives for addressing the issues the IRS is seeking to address through these changes.

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[23] Uncertain Tax Positions - Modified Policy of Restraint, Mar. 23, 2011, *available at* https://www.irs.gov/businesses/corporations/uncertain-tax-positions-modified-policy-of-restraint.

[24] Announcement 2010-75.

3. Required disclosure of items contemplated by the proposed changes raises privilege concerns and would increase audit friction and summons enforcement actions.

In affirming the policy of restraint and announcing the IRS's intention to issue Schedule UTP in 2010, then Commissioner Shulman stated that the IRS did not intend to "get into the heads of taxpayers as to the strengths and weaknesses of their positions."[25] The proposed requirement to disclose 1) authorities and other forms of nonbinding guidance that are "contrary to the tax position," 2) the identity of the tax position, 3) its amount, 4) its unit of account, 5) the nature of the controversy or potential controversy, 6) "all" information pertaining to the nature, amount, or timing of the tax position uncertainty, and 7) information that further defines a description of the legal issues presented by the facts does just that and raises privilege issues that should not be implicated in an IRS form. The apparent about-face of the IRS on this position will only serve to increase audit contentiousness, rather than efficiency, as the parties will be forced into asserting and defending privilege claims in summons enforcement proceedings. Rushed implementation of the proposed changes may in fact result in the IRS receiving less information in Schedule UTP, not more, undermining the IRS's sole objective of improving the schedule's usefulness.

Courts have held differently concerning the extent to which the attorney-client privilege or work-product doctrine protects tax accrual workpapers from disclosure. This question implicates the broader issue of how to assess claims of privilege over dual-purpose communications which is currently before the Supreme Court.[26] The Supreme Court in *Arthur Young & Co.* affirmed the IRS's general authority to summons tax accrual workpapers from a taxpayer's financial statement auditor.[27] That decision, however, did not address whether matters protected by the attorney-client privilege or work-product protection can be summoned; it dealt only with whether a general accountant-client privilege should be fashioned to protect such documents.

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[25] Remarks of IRS Commissioner Douglas H. Shulman to the New York State Bar Association Taxation Section Annual Meeting in New York City, IR-2010-13 (Jan. 26, 2010), *available at* https://www.irs.gov/pub/irs-news/ir-10-013.pdf.

[26] The U.S. Supreme Court recently granted a petition for a writ of certiorari asking the Court to review a circuit court decision involving the application of the attorney-client privilege to dual-purpose communications. *See In re Grand Jury*, 23 F. 4th 1088 (9th Cir. 2022), *cert. granted*, No. 21-1397 (U.S. Oct. 3, 2022). The case involves communications made both to allow a law firm to provide its client with legal advice and to facilitate the preparation of tax returns and will provide the Court an opportunity to address a three-way split among the circuits on how to assess dual purpose privilege claims.

[27] In so holding, the Court recognized the IRS's administrative sensitivity to production of tax accrual workpapers and stated the IRS's promulgation of its so-called policy of restraint refuted the taxpayer's argument that granting the IRS access to a roadmap of mental impressions was unfair. *See United States v. Arthur Young & Co.*, 465 U.S. at 820-21 & n.17 (1984). The proposed changes to Schedule UTP are contrary to the IRS's policy of restraint and materially erode this administrative sensitivity.

In *United States v. Wells Fargo & Co.*,[28] the court reviewed the tax accrual workpapers at issue and concluded that both the recognition analysis and the measurement analysis in them reflected the legal analysis conducted by Wells Fargo's attorneys in preparation of litigation. The court reasoned that the identification of the UTPs was information created in the ordinary course of business and was therefore discoverable. Quantification of the reserve amount, however, relied on the professional judgment and impressions of legal counsel to establish outcome probabilities and was protected from disclosure. In this regard, the court stated, "[a]llowing the IRS to access Wells Fargo's recognition and measurement analysis in the [tax accrual workpapers] would provide a window into the legal thinking of Wells Fargo's attorneys on active litigation strategy, running counter to the purpose of the work product doctrine."

Based on TEI member experience, it is common for legal counsel or a federally authorized tax practitioner to be involved in a company's UTP analysis under both steps of the analysis. In doing so, the advisor's knowledge is accessed with respect to, among other factors, the strengths and weaknesses of the company's arguments in favor of its tax position, negotiation strategies, thoughts and opinions of likely outcomes, settlement options the company is willing to consider, and the company's intent to litigate. The sensitive nature of the ASC 740-10 analysis raises privilege issues, which guided the policy choices the IRS made when adopting Schedule UTP in 2010 and which the IRS is summarily discounting in the proposed changes to Schedule UTP in 2022. As previously stated, it is inappropriate to use Schedule UTP, or any other IRS form, as an administrative tool to require disclosure of privileged information. An IRS reporting form is not the proper place to sort out the application of legal privileges and subject matter waiver issues.

4. **Proposed new Columns (c) and (d) in draft Schedule UTP misrepresent what constitutes binding authorities, require disclosure of legal judgments that may be protected by privilege, and** invite unnecessary and unproductive compliance disputes**.**

Existing Schedule UTP requires taxpayers to disclose "the primary IRC sections (up to three) **relating to** the tax position."[29] The proposed revisions would materially expand this disclosure by requiring disclosure of any Treasury Regulation, Revenue Procedure, Revenue Ruling, Private Letter Ruling, Technical Advice Memorandum, Notice, court decision, Chief Counsel Advice, Field Service Advice, or General Counsel Memorandum that is "contrary to the tax position."[30] The proposed disclosure of whether an authority (or a NON-authority) is contrary to a tax position raises privilege issues as it

[28] *United States v. Wells Fargo & Co.*, No. 0:10-mc-00057 (D. Minn. June 4, 2013).
[29] Instructions for Schedule UTP (Form 1120) (Dec. 2019) at 5 (providing instructions for completing Column (b) (emphasis added)).
[30] *See* new Columns (c) and (d) in the draft Schedule UTP and Proposed Instruction Revisions at pages 5, 7.

implicates a taxpayer's legal analysis surrounding a UTP. It is also contrary to the IRS's 2010 decision not to require disclosure of the nature of the uncertainty,[31] as well as the Internal Revenue Manual.[32]

Moreover, it is simply wrong to include non-binding, written determinations, such as Private Letter Rulings, Technical Advice Memorandum, Chief Counsel Advice, Field Service Advice, and General Counsel Memorandum, in a listing of authoritative "rules." [33] These informal determinations are neither authoritative nor rules, and the IRS commonly disregards such sources when they do not support a position being advocated. As the Tax Court has stated, "the authoritative sources of Federal tax law are statutes, regulations, and judicial case law and not informal IRS sources."[34] These nonbinding determinations are also fact specific, and it is not always clear when a taxpayer has different facts or is taking a position contrary to that taken in a specific determination.

It is also inaccurate and confusing to include the generic term, "court decision," in a list of primary authorities applicable to a specific taxpayer's UTPs. Court decisions are primary authority only if handed down by a court that resides in the circuit in which a taxpayer sits. There is a significant risk that IRS examiners may consider non-binding decisions from other U.S. districts or Circuit Courts of Appeals to be court decisions relevant to a Schedule UTP disclosure when they, in fact, would not be considered binding legal precedent in that taxpayer's jurisdiction or court. In addition, and as discussed with non-binding guidance above, any court case turns on the facts and issues presented. With the many iterations of facts and their applications to judicial precedent in the universe of reported tax cases, shades of persuasive authority, adverse authority, and distinguishable authority run the gamut and lack bright line rules. Identification of a fact-reliant authority that is contrary to a UTP is a subjective determination that requires legal analysis and judgment, the required disclosure of which raises privilege concerns.

It is also impracticable for taxpayers to identify all the various types of authorities and non-authorities that may be construed as contrary to a UTP. The issue or issues that make a tax position uncertain may be addressed by multiple sources with varying fact patterns and varying interpretations of the law. It is not possible for a taxpayer to know with certainty which or how many such sources to disclose, and such ambiguity would not only place onerous compliance burdens on taxpayers, but also invite unnecessary and unproductive disputes with the IRS. Accordingly, proposed new Columns (c) and (d) in Draft

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[31] *See* Announcement 2010-75.

[32] The IRM prohibits examiners from asking during the course of an audit why a taxpayer is reserved for a tax position, the dollar amount of the reserve, and why the taxpayer thinks a tax position is uncertain. IRM 4.46.3.3.5.1.2(2), (3), UTP Guidance - Planning the Audit (01-19-2022). The IRS has not provided a rational basis for modifying this policy and should not do so through proposed changes to a reporting schedule that it is seeking to implement in a rushed timeframe.

[33] While the proposed changes purport to require disclosure of additional information that would otherwise be reportable on Forms 8275 and 8275-R, the requested information goes beyond information required on such forms and raises the issues discussed herein.

[34] *Deal v. Commissioner*, 78 TCM (CCH) 638, 639 (1999).

Schedule UTP should be eliminated together with all other proposed requirements to disclose the subjective determination of what makes a UTP uncertain.

5. **Proposed new Column (k) in draft Schedule UTP, requiring incremental amounts included on the line related to the UTP, creates the same concerns amply voiced by commenters in 2010 and these concerns remain at the forefront for taxpayers today.**

Proposed new Column (k) would require reporting of "the incremental amount included on the line related to the tax position," and the Proposed Instruction Revisions in Part III, Concise Description of UTPs, would require disclosure of the "unit of account." The Proposed Instruction Revisions for Columns (i) through (k) explain the new requirement to report the UTP amount as follows:[35]

> Identify the location of the tax position and **amount of the unrecognized federal income tax benefits** (see the definition of size earlier). Enter the form number or Schedule and the line number in columns (i) and (j) and **the amount of the item in column (k)**. For any expense item, report in column (k) **the incremental amount included on the line related to the tax position taken**.
>
> If the tax position relates to an item of deferred income or unearned revenue, report in columns (i) and (j) the schedule or form and line number where the item is reported (for example, Sch. M-3, line 20, or Sch. L, line 21). Report in column (k) **the amount included on the line related to the tax position taken**.

The proposed requirements to "identify the . . . amount of the unrecognized federal income tax benefits" related to a UTP, the amount of the item, and its unit of account raise significant legal issues that were thoroughly vetted in 2010 when the IRS made the measured decision not to require reporting of UTP amounts. Further, it is not clear what "the incremental amount included on the line related to the tax position taken" as stated in the Proposed Instruction Revisions is intended to mean. Is it the amount of the unrecognized federal income tax benefit or the amount related to a UTP that is reported in a line of the income tax return?

[35] Proposed Instruction Revisions at page 6 (emphasis added).

The tax press recently reported that an IRS official clarified that the amount that is intended to be reported on new Column (k) of proposed Schedule UTP is the amount related to a UTP that is reported on the line of the tax return, not the unrecognized tax benefit.[36] This intent is not reflected in the draft Schedule UTP or the Proposed Instruction Revisions which would require disclosure of:

- the "amount of the unrecognized federal income tax benefits";[37]and
- "information that can reasonably be expected to apprise the IRS of the identity of the tax position, its amount, [and] unit of account. . . ."[38]

Assuming it is the IRS's intent, the new reporting requirement would nevertheless raise computational and privilege issues. Regarding the latter, if a UTP satisfies the recognition step of the ASC 740-10 analysis, the estimated tax benefit associated with the position may be reduced under the measurement step to reflect the largest amount of tax benefit that is greater than 50% likely to be sustained upon settlement. If a taxpayer has a single UTP, a requirement to associate the UTP with a specific amount reported in the line item of a tax return would reveal taxpayer judgments on the likelihood of settlement. Further, the IRS official's explanation does not address the new requirement to disclose a UTP's unit of account, the determination of which is a "matter[] of judgment based on the individual facts and circumstances of that position evaluated in light of all available evidence."[39] The privilege issues implicated by these proposed disclosure requirements and the confusion caused by the Proposed Instruction Revisions are compelling reasons to eliminate the proposed changes entirely or, at a minimum, pause implementation of the proposed changes to Schedule UTP until a meaningful comment period can occur.

The proposal to require disclosure of UTP amounts also raises computational issues and creates uncertainty. ASC 740-10 requires a company to analyze and disclose income tax risks for all jurisdictions (U.S., state, local, and foreign) in which the company is doing business and is potentially subject to income taxes. As a part of their ASC 740-10 calculations, taxpayers do not compute the amount of the unrecognized federal income tax benefits associated with any particular line in a U.S. tax return. Allocation of UTP amounts to tax return line items would not be an automatic process, as UTPs may implicate multiple lines on multiple IRS forms. Further, if a UTP satisfies the recognition step of the ASC 740-10 analysis, it may be reduced under the measurement step to reflect the largest amount of tax benefit that is greater than 50% likely to be sustained upon settlement. The absence of a direct correlation between the amount reserved for a UTP and the amount reported on the line of a tax return raises a host of computational issues that examiners may attempt to resolve through the IDR process. Given the sensitive nature of UTPs and tax accrual workpapers, these issues would likely consume IRS and

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[36] *See* IRS Official's November 2 Remarks, supra note 7.
[37] Proposed Instruction Revisions at 6 (providing instructions for Columns (i) through (k)).
[38] Id. at 7 (providing instructions for concise descriptions of UTPs).
[39] ASC 740-10-25-7.

taxpayer resources far in excess of any presumed benefit of reporting the information. In addition, the proposed reporting expectation for deferred income is unclear. If recognition of a UTP item in a tax return is deferred from Year 1 to Year 2, there would be nothing to report in a line item of a tax return in Year 1.

A requirement to disclose the amount of unrecognized federal income tax benefit associated with a line in a tax return, which, as discussed above, is stated in the Proposed Instruction Revisions but apparently was not the IRS's intent, raises significant computational issues. For example, when a taxpayer has multiple UTPs, the amount of tax attributable to each issue may be dependent upon assumptions made in analyzing one or more other UTPs. Allocating unrecognized tax benefits to specific lines would require taxpayers to rerun their tax return with and without individual items. Such a requirement raises a variety of costly implementation issues. The aggregation of those computations, some of which would be computationally interrelated, are also likely to mislead the IRS as to the magnitude of the impact. We respectfully submit that resources spent by taxpayers making multiple iterations of complex tax return computations and by the IRS trying to understand such computations would far outweigh any perceived benefit of the proposed disclosure.

It is important to keep in mind that "81 percent of Schedules UTP include issues that would have been selected irrespective of its Disclosure."[40] A taxpayer's obligation to assist the IRS examine its returns through self-reporting does not extend to the point that the taxpayer is required to self-audit or reveal detailed aspects of technical "soft spots" in its tax returns. Taxpayers should not be compelled to undertake what are essentially core audit functions of the IRS. Accordingly, we encourage the IRS to evaluate thoroughly the relative costs and benefits of its proposals, including the burden of requiring additional disclosures, the value it will provide to IRS examination teams, and the risk that taxpayers may be waiving privilege protections by providing such information. We question whether such an analysis can be accomplished within the timeframe the IRS is seeking to implement proposed changes to Schedule UTP.

6. Proposed additions to Schedule UTP regarding amended returns create substantial administrative burdens on taxpayers already going to great lengths to prepare complete, accurate, and materially correct returns.

The proposed changes provide the following regarding amended returns:

> A complete and accurate disclosure of a tax position on Schedule UTP, Form 8275, or Form 8275-R must be included in an amended return that is filed to claim the benefit of the tax

[40] Report by Treasury Inspector General for Tax Administration, The Uncertain Tax Position Statement Does Not Contain Sufficient Information to Be Useful in Compliance Efforts, Ref. Num. 2018-30-023 (Mar. 23, 2018) at page 17.

> positions reported on these disclosure forms. If an amended return is filed to carryover attributes such as net operating losses or tax credits arising from tax positions reported in prior filings, the disclosure forms do not need to be completed. Instead, attach a statement to the amended return that identifies each tax position, the amount, the nature of the disclosure, the form used to report the disclosure, and the tax year in which the tax position originates.

The requirement to disclose original year UTP information with amended returns reporting carryovers or carrybacks unnecessarily imposes a burden on taxpayers that is unlikely to result in useful information to the IRS. The requirement assumes that the impact of such positions on carryover attributes can be easily traced to a single year. Carryovers and carrybacks are not calculated on a transaction-by-transaction basis. Rather the amount carried into another year is the aggregate attribute not utilized in a current year. A simple example illustrates this point. Assume a taxpayer has $100 in foreign tax credits in a particular year, $10 of which is attributable to a schedule UTP item. If the taxpayer utilizes $60 of credits, it would carry $40 of credits into another year. There is no rule or requirement indicating how the $40 in excess credits relates to the original $10 UTP item. Possible answers are that all of the $10 was utilized in the original year, none of it was, or only a pro-rata share was used. In such a situation, a taxpayer could disclose nothing in the carryover year, assuming all the UTP credit was utilized in the current year, or disclose the UTP again in the carryover year. The proposed reporting requirement would add yet another reporting burden with little apparent benefit. It also invites disputes as to when the portion of the UTP was actually utilized as illustrated above. A lack of guidance on the myriad of situations that may occur is likely to create confusion, differences in interpretation, and only result in more unhelpful information being reported to the IRS at taxpayers' expense.

Concluding Observations

The proposed changes to Schedule UTP do not reflect sound tax administration or fundamental fairness to taxpayers. The IRS appears to be rushing to implement the proposed changes to meet internal deadlines for preparing forms for the 2022 filing season when there is no legitimate policy reason for doing so. We urge the IRS not to abandon all of the dialogue, thinking, and decisions that informed the disclosure requirements in current Schedule UTP in favor of a rushed implementation of a new reporting regime that carries the very likely risk of materially increasing procedural disputes with the system's largest and most sophisticated taxpayers in exchange for marginal improvements, if any, to the usefulness of UTP reporting. Moving forward with blinders of self-interest and without a meaningful stakeholder dialog, including evaluation of less harmful alternatives, will almost certainly lead to unintended consequences and a bad result for the IRS and taxpayers alike.

If the IRS chooses to move forward without further input, it should not do so before implementing clearly articulated procedural safeguards to 1) ensure that the enhanced UTP disclosures are properly interpreted and not used as a substitute for a full and objective examination of the facts and applicable

law, and 2) protect taxpayers' legitimate interests in the confidentiality of information (whether or not protected by a legal privilege). In addition, the IRS should ensure that it has the resources (in terms of well-trained personnel and well-thought-out processes) necessary to use the data properly and should commit to making significant changes in its practices to ensure the efficient and fair disposition of cases.

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TEI appreciates the opportunity to comment on the draft changes to Schedule UTP and its instructions. Our members have extensive experience with ASC 740-10 and Schedule UTP and welcome the opportunity to engage in a meaningful discussion about the benefits and detriments of the proposed changes, as well as possible alternatives. To do so, please contact TEI's Chief Tax Counsel, Patrick Evans, on 202.464.8351 or pevans@tei.org.

Respectfully submitted,

Wayne G. Monfries
International President
TAX EXECUTIVES INSTITUTE

cc: Nikole Flax, Internal Revenue Service, nikole.c.flax@irs.gov
Holly Paz, Internal Revenue Service, holly.o.paz@irs.gov
Thomas C. West, Jr., Deputy Assistant Secretary (Tax Policy), thomas.west2@treasury.gov
Krishna P. Vallabhaneni, Tax Legislative Counsel, krishna.vallabhaneni@treasury.gov