

Frequently Ask Questions

1. Which Taxpayers are required to file Schedule UTP beginning in 2010?

Initially, the Internal Revenue Service (Service) proposed that all companies with \$10 million or more in assets and with audited financial statements should complete the schedule. In response to comments, the Service established a five-year phase-in reporting requirement.

- *Beginning with the **2010** tax year - Corporations with assets equal to or exceeding \$100 million must file Schedule UTP.*
- *Beginning with the **2012** tax year - Corporations with assets equal to or exceeding \$50 million must file Schedule UPT.*
- *Beginning with the **2014** tax year - Corporations with assets equal to or exceeding \$10 million must file Schedule UTP*

2. Was the maximum tax amount (MTA) with respect to each tax position included on Schedule UTP?

The Service initially sought information regarding the size of each reported issue to prioritize audit selection and issue focus. The MTA was to be determined by taking the item of income, gain, loss, or deduction and multiplying it by 35 percent. No considerations were made for the likelihood of success on the merits, and commenters argued that the large MTAs could be far greater than likely examination adjustments. Furthermore, large MTAs could become targets for examination without the proper level of consideration and analysis by the IRS. Eventually, the MTA was eliminated, and taxpayers are not required to assign a specific dollar amount to any position. Instead Schedule UTP requires companies to rank the positions by the reserve amount, taking into account potential interest and penalties.

3. Will disclosing positions based on an expectation to litigate be unduly burdensome, difficult to quantify, and require reassessment of the position taken on the audited financial statement when actually filing Schedule UTP?

Schedule UTP maintains this reporting requirement, but the instructions clarify that a corporation may rely on the reserve decisions in the financial statements for Schedule UTP reporting. The Service eliminated the requirement that corporations disclose positions for which no reserve was taken based on IRS administrative practice.

4. Perhaps the most significant concern for practitioners is the issue of privilege and work product. FIN 48 reporting calls for an aggregate disclosure of reserves, but Schedule UTP's disclosure of individual items and descriptions goes beyond what the IRS can legally require. Would disclosing a position with a description of the rationale and nature of uncertainty reveal

confidential information? Could these disclosures waive privilege and work product protections?

A taxpayer is not required to disclose a rationale for its position but is only required to disclose information sufficient to identify the issue and relevant facts. These descriptions are designed to be consistent with the requirements for a Form 8275 Disclosure Statement. Further, the instructions provide that the concise description should not include information regarding the corporation's assessment of the hazards of a tax position or an analysis of the support for or against the tax position.

5. Does disclosing amounts and descriptions simply provide the Service with a roadmap of issues for examination?

The Service states that Schedule UTP will lead to a new approach to examinations and that the information will not be misused. The newly named Large Business & International (LB & I) division issued a directive noting that Schedule UTP does not serve as a substitute for independent judgment and that special training will be given regarding Schedule UTPs.

Furthermore, to allay concerns that Schedule UTP would affect the policy of restraint, the Service announced that Schedule UTP disclosures will not affect the protections afforded by the Service's policy of restraint, that quantification and ranking of issues are protected under this policy, and that the Service will not seek documents that are otherwise privileged. Although the Service has indicated its decision that taxpayers have not waived privilege through disclosure to financial advisers, it is important to be aware that the waiver does not apply if other actions have otherwise waived the privilege.

6. Will foreign corporations and related party issues, eliminating duplicative disclosures, definitional issues, potential penalties accompanying the schedule, and dedicating more of the Services resources to letter rulings and pre-filing agreements resolve issues prior to filing?

The final instructions address some of these issues—corporations do not report tax positions of a related party, disclosure on Schedule UTP does not require additional filing of Form 8275 or Form 8275-R, and definitions of "audited financial statement" and "record a reserve" are clarified.

7. Prop. Treas. Reg. § 1.6012-2(a)(5) provides that reporting is required for positions taken in the 2010 tax year and going forward. Example 8 in IRS Announcement 2010-30, treats an expiring net operating loss (NOL) from a previous year as a tax position taken when the NOL is used. For accounting method changes, the change from an improper method may give rise to a reserve today for past tax years, because the Service may reexamine previously closed tax years. How are the NOLs and accounting method changes treated?

As far as the accounting method changes, the change from an improper method may give rise to a reserve today for past tax years, because the Service may

reexamine previously closed tax years. These issues and others have not been addressed by the Service, but the Service plans to implement Schedule UTP with continued feedback and dialogue with taxpayers and practitioners to work through these and other issues that arise.