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VIA EMAIL – LBI.UTP.COMMUNICATIONS@IRS.GOV

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Re: Comments on Draft Changes to Schedule UTP and Instructions

Dear Ms. Paz and Ms. Best:

Thank you for the opportunity to provide comments to the Internal Revenue Service ("Service") on the draft changes to Schedule UTP, Uncertain Tax Position Statement, and Instructions to Schedule UTP (Form 1120), announced on October 11, 2022 ("Draft Changes").[1] We understand that several other comment letters will be submitted. Accordingly, we have limited our comments to matters concerning the scope of disclosure, including disclosure of a tax position "contrary" to an "authoritative source."

A. Explanation of Certain Draft Changes

Columns (c) and (d) on the draft Schedule UTP require taxpayers to disclose tax positions contrary to tax rules and regulations. This requirement conforms to the disclosure required if a taxpayer chooses to file Form 8275, Disclosure Statement, or Form 8275-R, Regulation Disclosure Statement, and tracks the

[1] We understand that the draft change related to disclosing the "amount" in Column (k) of Schedule UTP is intended to refer to the amount reported on the line that contains the uncertain tax position rather than the size of an unrecognized tax benefit, and that this important point will be clarified in the final schedule and instructions. Accordingly, these comments do not address the proposed "amount" disclosure requirement.

language in I.R.C. § 6662(b)(1), which imposes a penalty for "disregard of rules or regulations." (We note that unlike Schedule UTP taxpayers are not required to file Form 8275 or 8275-R.).

However, the disclosures required in new columns (c) and (d) go beyond rules and regulations and go beyond the disclosure required in Forms 8275 and 8275-R. The Draft Changes require taxpayers to disclose a tax position contrary to an "authoritative source," which is defined broadly to include case law, guidance published in the Internal Revenue Bulletin ("Subregulatory Guidance"), and almost all other IRS guidance not published in the Internal Revenue Bulletin ("Private Guidance").[2] The identified Private Guidance encompasses private letter rulings ("PLR"), technical advice memoranda ("TAM"), chief counsel advice ("CCA"), field service advice ("FSA"), and general counsel memoranda ("GCM").

The Draft Changes also substantially expand the meaning of "concise description," as reflected by the following comparison between the current instructions and the draft changes (inserts in italics):

> **Concise** Description. ~~Provide a concise description of the tax position, including~~ *To be considered complete, the disclosure must include* 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*, its amount, unit of account,* and the nature of the ~~issue. In most cases, the description should not exceed a few sentences~~ *controversy or potential controversy.*
>
> *A "description of the relevant facts affecting the tax treatment of the position" should include all information pertaining to the nature, amount, or timing of the tax position uncertainty. For example, if a corporation's tax position is to claim a current year deduction for the cost of fixing the roof of a building, the description should indicate why it was determined that the work was performed to keep the asset in normal operating condition and why the costs do not improve or extend the useful life of the asset.*
>
> *The "identity of the tax position" should provide information that further defines the primary IRC section(s), rule, or regulation section listed in Parts I and II of Schedule UTP, such as the identification of a 15-year depreciable life assigned to land improvement assets under section 168 or indicating that a request has been filed in accordance with Rev. Rul. 90-38 to change from an erroneous method of accounting for advanced payments.*
>
> *Information concerning the "nature of the controversy or potential controversy" can include a description of the legal issues presented by the facts. It should identify, for example, the specific entity, country, or transaction to which the tax position relates, the character of income, the type of expense, the relationship of the tax position to other assets or activities, and whether the uncertainty relates to computational issues, substantiation*

[2] This broad definition conflicts with longstanding case law holding that "the authoritative sources of Federal tax law are in the statutes, regulations, and judicial decisions … ." *Zimmerman v. Commissioner*, 71 T.C. 367, 371 (1978), *aff'd without published opinion* 614 F.2d 1294 (2d Cir. 1979).

> *issues, sampling methodologies, or legal interpretation.* Stating that a concise description is "Available upon request" is not an adequate description."
>
> A concise description should not include an assessment of the hazards of a tax position or an analysis of the support for or against the tax position.

According to the Draft Changes, the consequence of not disclosing the "authoritative sources" (including Private Guidance) or complying with the description requirement is the taxpayer's inability to defend against penalties for disregard of rules or regulations and a substantial understatement of tax based on adequate disclosure:

> Failure to provide a complete and accurate disclosure of the tax position on Schedule UTP will not satisfy the section 6662 adequate disclosure requirements for Form 8275, 8275-R, or tax position reported on Schedule UTP.

The Draft Changes are intended to apply to the 2022 tax year (processing year 2023).

B. Concerns

The additional information required by the Draft Changes raises several concerns, some of which are set forth below.

1. Authority to Require Disclosure of Contrary Authorities

Neither the Code nor the regulations *affirmatively require* a taxpayer to disclose authorities in support of or against its position. Rather, the relevant regulations provide taxpayers with *the option* of disclosing contrary rules (on Form 8275) or regulations (Form 8275-R) if they want to assert the adequate disclosure defense to penalties for disregard of rules or regulations and substantial understatement of tax.[3] Thus, the Draft Changes require taxpayers with uncertain tax positions to file the equivalent of Forms 8275 or 8275-R, an act that was previously voluntary. There is no express authority that allows the Service—via tax forms and instructions and in the absence of statutory or regulatory support—to require such disclosure. This is particularly true where the failure to disclose could result in the elimination of a penalty defense provided by the Code and regulations.

2. Utility of Disclosing Contrary Authorities

As noted above, the Draft Changes go well beyond the information currently required to be disclosed on Forms 8275 and 8275-R, which are voluntary filings that taxpayers can attach to their tax returns for penalty protection purposes. For purpose of penalties, "rules or regulations" encompass the provisions of

[3] *See* I.R.C. § 6662(d)(2)(B); Treas. Reg. § 1.6662-3(c); Treas. Reg. §§ 1.6662-4(e) and (f).

the Code, temporary or final regulations, and revenue rulings or notices.[4] They do not encompass the other authorities, like the Private Guidance, identified in the Draft Changes.

Under I.R.C. § 6110(k)(3), "a written determination may not be used or cited as precedent."[5] The Service reminds taxpayers of this point on its website—"it is important to note that pursuant to 26 USC § 6110(k)(3) [written determinations] cannot be used or cited as precedent."[6] A "written determination" is statutorily defined as "a ruling, determination letter, technical advice memorandum, or Chief Counsel advice."[7] Chief Counsel advice is further defined as:[8]

> [W]ritten advice or instruction, under whatever name or designation, prepared by any national office component of the Office of Chief Counsel which is issued to field or service center employees of the Service or regional or district employees of the Office of Chief Counsel; and conveys any legal interpretation of a revenue provision; any Internal Revenue Service or Office of Chief Counsel position or policy concerning a revenue provision; or any legal interpretation of State law, foreign law, or other Federal law relating to the assessment or collection of any liability under a revenue provision.

Thus, CCAs subject to disclosure under the Draft Changes may extend to a wide variety of non-precedential materials issued by the Service.

The concerning aspect of requiring disclosure of contrary authority is underscored when viewed against the changes to Examples 2 and 5 in the Draft Changes. Those examples would require taxpayers to disclose a tax position if an unrecognized tax benefit is booked during or a result of a tax examination or based on a change in the expectation of a taxpayer to litigate if it determines that the probability of settling with the

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[4] Treas. Reg. § 1.6662-3(b)(2); *Gerdau MacSteel Inc. v. Commissioner*, 139 T.C. 67, 187 (2012).

[5] *See also* Treas. Reg. § 301.6110-7(b); *SIH Partners LLLP v. Commissioner*, 150 T.C. 28, 48 (2018) ("The documents that petitioner cites are nonprecedential, and we would not rely on them for a point of law even if we found their reasoning applicable and persuasive. *See* sec. 6110(k)(3) (a written determination may not be used or cited as precedent; *Gen Dynamics Corp. v. Commissioner*, 108 T.C. 107, 120 (1997) (proposed regulations accorded no more weight than a litigating position."), *aff'd* 923 F.3d 296, 306 (3d Cir. 2019) ("internal guidance directions are not binding on an agency and do not have the force of law"); *Lucky Stores Inc. v. Commissioner*, 107 T.C. 1, 16 (1996) ("Respondent point out that section 6110(j)(3) prohibits using or citing a written determination as precedent, unless regulations provide otherwise, which is not the case here."). Indeed, as the Department of the Treasury and the Service recently stated, even Subregulatory Guidance is not binding and does not have the force and effect of law. Policy Statement on the Tax Regulatory Process (March 5, 2019) (https://home.treasury.gov/system/files/131/Policy-Statement-on-the-Tax-Regulatory-Process-3-4-19.pdf).

[6] https://www.irs.gov/written-determinations; *see also TBL Licensing LLC v. Commissioner*, 158 T.C. No. 1 (Jan. 31, 2022) ("On the merits, respondent reminds us, citing section 6110(k)(3), that "Private Letter Rulings may not be used or cited as precedent.").

[7] I.R.C. § 6110(b)(1)(A). Advance pricing agreements and closing agreements are exempted from the definition of written determination. I.R.C. § 6110(b)(1)(B); I.R.C. §§ 6103(b)(2)(C) and (D).

[8] I.R.C. § 6110(i)(1)(A) (cleaned up). The term "revenue provision" is defined as "any existing or former internal revenue law, regulation, revenue ruling, revenue procedure, other published or unpublished guidance, or tax treaty, either in general or as applied to specific taxpayers or groups of specific taxpayers." I.R.C. § 6110(i)(1)(B).

Service is less than 50 percent. Thus, a taxpayer would not only be required to disclose contrary authorities, but also would have to provide a detailed description of the issue during the course of an ongoing examination.

No explanation is provided in the Draft Changes as to why disclosure should be made of non-precedential materials. Arguably, the only benefit of requiring taxpayers to disclose Private Guidance on Schedule UTP is to provide the Service with a roadmap to challenging an uncertain tax position. This raises serious issues regarding the burden on taxpayers and the ability to preserve privilege, discussed below.

3. Burden of Identifying Contrary Authorities

The requirement to disclose all "contrary" guidance imposes a substantial burden on taxpayers, both in terms of time and cost, and is untenable. Taxpayers would be required to research every federal jurisdiction and every potentially relevant item of guidance issued by the Service going back decades, and then make what will often be difficult judgment calls to determine whether any particular item of guidance constitutes contrary authority.

Moreover, Private Guidance is often heavily redacted, and a proper legal analysis depends on the specific facts of a given case. Indeed, even Subregulatory Guidance is not binding on taxpayers, is further limited to its pivotal facts, and merely represents the Service's litigating position. Similar issues are present with case law, other than case law from the U.S. Supreme Court or the appellate jurisdiction in which the taxpayer resides.

Finally, Form 1120, U.S. Corporation Income Tax Return, requires the following jurat:

> Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

If a taxpayer or a return preparer fail to expend the substantial resources necessary to search *all* authorities, even those not relevant or precedential to determine which are "contrary" to its tax reporting position, then it is unclear whether the Service might assert a violation of the above jurat requirement.

4. Privilege Concerns

The requirement to disclose non-factual information related to an uncertain tax position also raises serious privilege concerns and arguably conflicts with the Code, case law, and the current and proposed instructions to Schedule UTP. As noted above, there is no statutory requirement to disclose contrary authorities to the Service. Indeed, to be adequate, Congress only requires the disclosure—by choice of the taxpayer—of "the relevant facts affecting the item's tax treatment."[9] And, the current and proposed

[9] I.R.C. § 6662(d)(2)(B)(i).

changes to the Schedule UTP instructions specifically state that the description "should not include an assessment of the hazards of litigation of a tax position or any analysis of the support for or *against the tax position*."[10] The required disclosure of legal authorities, whether in support or adverse to a claimed position on a tax return, raises serious privilege concerns.

In *Zaentz*,[11] the taxpayer requested that the Service provide, among other things, a statement of legal authorities. When the Service did not provide this information, the taxpayer moved to compel production. The Tax Court denied the request, explaining that under the Tax Court Rules relating to discovery there is no specific obligation on a party to set forth the legal authorities on which the party relies. But, the court did not stop there. It noted that "[t]he statement of legal authorities on which the Commissioner relies appears to come within the category of work product."[12]

Determining whether an uncertain tax position exists often involves seeking legal advice, from both in-house and from outside advisors (attorneys and federally authorized tax practitioners). This analysis may also require the creation of materials that are protected by the attorney-client privileged, the attorney work product privilege, and the Congressionally created privilege for advice given by federally authorized tax practitioners. Thus, disclosing authorities, whether in support of or contrary to a tax position claimed on a return, raises serious privilege concerns and calls into question whether the Service will continue to abide by its policy of restraint regarding information contained in tax accrual workpapers.[13] As a result, taxpayers may be forced to formally assert privilege when responding to columns (c) and (d) and providing the expanded description set forth in the Draft Changes, with a potential consequence that the Service will treat the Schedule UTP as incomplete for purposes of the adequate disclosure exception. Taxpayers should not have to choose between waiving privilege and disclosing the mental impressions of their legal and tax advisors to comply with Schedule UTP.

5. Penalty Protection

On October 20, 2022, comments were submitted by Ivins, Phillips & Barker requesting clarification regarding how disclosure on Schedule UTP interplays with the penalty for disregarding rules or regulations.[14] The concerns raised by those comments are well-founded and should be addressed

[10] *See also* "Prepared Remarks of Commissioner of Internal Revenue Douglas H. Shulman before the Tax Executives Institute 60th Mid-Year Meeting," www.irs.gov/newsroom/prepared-remakrs-of-commissioner-of-internal-revenue-douglas-h-shulman-before-the-tax-executives-institute-60th-mid-year-meeting (Apr. 12, 2010) ("We believe we have crafted a proposal that gives us the information we need to do our job without asking taxpayers to divulge the strengths or weaknesses of their uncertain tax positions. And, we are maintaining our current policy of restraint concerning tax accrual workpapers.").

[11] *Zaentz v. Commissioner*, 73 T.C. 469 (1979).

[12] *Id.* at 479; *see also Hosp. Corp. of Am. v. Commissioner*, T.C. Memo. 1994-100 ("In *Zaentz*, we held that an attorney's work product or a discovery request which seeks only 'a mere statement of a party's legal authorities' is privileged, and therefore, not discoverable.").

[13] We believe that other interested parties will be submitting comments on the policy of restraint and, therefore, have not focused on this concern in our comments.

[14] *See* www.ipbtax.com/assets/htmldocuments/102022%20Comments%20re%20Schedule%20UTP%20IPB.pdf.

regardless of whether the Service ultimately determines to require additional information to be disclosed on Schedule UTP.

6. Timing

The Service has indicated that any changes to Schedule UTP will be effective for returns for the 2022 tax year, which will be filed in 2023. However, before finalizing any changes the Service has indicated that it will consider comments submitted by November 18, 2022. We understand that several comments will be submitted; thus, any final changes by the Service may not occur until next year.

Taxpayers subject to the Schedule UTP reporting requirement must engage in the year-end (and quarterly) tax provision process. They will need time to consider any changes to Schedule UTP and discuss with their attest firm to ensure they are compliant and engaging in the correct process. Thus, we are concerned with the Service's intention to hastily make changes to Schedule UTP effective for 2022 tax returns.

C. Recommendations

Based on the above, we recommend as follows:

- Reconsider whether any changes should be made to Schedule UTP given the current rules in place regarding other disclosures (*e.g.*, Forms 8275 and 8275-R) and the serious privilege concerns raised by the additional disclosure requirements.

- Remove the *requirement* to disclose any positions that are "contrary" to any authorities or, at a minimum, to any Private Guidance.

- If changes are made to Schedule UTP, work with taxpayers to determine the appropriate standard for determining whether there is "contrary" authority and what steps a taxpayer or return preparer must take before being able to satisfy the jurat requirement.

- Issue published guidance clarifying that proper disclosure on Schedule UTP will satisfy the adequate disclosure requirement for purposes of both the disregard of rules and regulations and substantial understatement of tax grounds for imposing penalties under I.R.C. § 6662.

- If changes are made to Schedule UTP, delay the effective date to the 2023 tax year (processing year 2024).

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Thank you for consideration of these comments and those that have, or will be, submitted by other taxpayers and interested parties.

Respectfully submitted,

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