

# Client Alert.

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September 14, 2010

## IRS Releases Proposed UTP Regulations

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On September 8, 2010, the IRS released proposed regulations 1.6012-2(a)(4)-(5) which require certain business taxpayers to attach the Schedule UTP, Uncertain Tax Position Statement, to their income tax returns effective for tax years beginning after December 15, 2009 and ending after the date of publication of the final regulations. The proposed regulations were published in the Federal Register on September 9.

Schedule UTP generally requires affected taxpayers to list their uncertain tax positions as those positions are determined under FIN 48 or other GAAP accounting principles and provide certain descriptive information about each of these positions. The IRS has received numerous comments on the proposed schedule, many of them negative. Some of the negative comments focus on what is perceived to be an inappropriate request for taxpayers to reveal internal legal analysis underlying uncertain tax positions. While issuing regulations to establish a filing requirement is certainly within the IRS's general authority under Code sections 6011 and 6012, exercising that authority in connection with a specific schedule for income tax returns is somewhat unusual absent a specific Code directive and suggests the IRS has decided to invoke its formal rule-making authority in response to the negative comments it has received.

The IRS explained its goal for the new proposed schedule in the preamble to the proposed regulations:

This information will aid the IRS in identifying those returns that pose the most significant risks of noncompliance and in selecting issues for examination. The IRS intends to implement the authority provided in this regulation initially by issuing a schedule and explanatory publication that require those corporations that prepare audited financial statements to file a schedule identifying and describing the uncertain tax positions, as described in FIN 48 and other generally accepted accounting standards, that relate to the tax liability reported on the return.

FIN 48 requires fairly detailed internal analysis on the part of business taxpayers to justify reserves for uncertain tax positions. FIN 48 determinations are thus viewed by the IRS as a kind of ready-made source of information to assist the IRS in allocating its audit resources when faced with relatively complex returns. Commenters have nonetheless questioned whether, despite the IRS's general authority to prescribe forms, privilege and work product protections are obstacles to obtaining the information requested by Schedule UTP.

The IRS has requested comments on the proposed regulations either through regular mail or electronically by October 12, 2010 and has scheduled a public hearing for October 15, 2010 at 10 a.m. Those wishing to participate in the hearing should also provide an outline of discussion topics in addition to written comments by October 12.

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