

12 September 2011



The Commissioner of Taxation
GPO Box 9990
CANBERRA ACT 2600

By email: ReportableTaxPosition@ato.gov.au
Copy: Ms Judy Morris – Assistant Commissioner

Dear Sir/Madam

The Group of 100 (G100), an organisation of CFOs from Australia's major business enterprises with a purpose of advancing Australia's financial competitiveness, is pleased to make a submission on the RTP Schedule and associated instructions released by the Commissioner. We understand the Commissioner will require a group of selected taxpayers to lodge the RTP Schedule with the company Income Tax Return (ITR) for the year ended 30 June 2012. Detailed comments are included in Appendix A.

The G100 believes that the RTP Schedule is unnecessary. In light of current provisioning practices, we do not understand the purpose of the schedule. This is particularly so given that the Commissioner is able to obtain much of the information disclosed on the RTP Schedule from an entity's financial statements. Ordinarily, an entity would make disclosures in respect of contingent liabilities in its financial statements. While existing accounting standards do not specifically discuss income tax exposures such as positions taken that may be challenged by tax authorities, in practice, and consistent with the definition of a current tax liability, the amount provided for is the best estimate of the amount of tax to be paid. Where the probability of a tax liability is less than fifty per cent an amount is not provided and a contingent liability is likely to be disclosed in respect of uncertain tax positions.

These factors mean that in our view, paragraph (a) of the definition of a RTP is superfluous. That is, it would be extremely rare that a taxpayer would take a position that carries a less than 50% likelihood of being correct without disclosing that position in some way in its financial statements. In our view, it is unclear what the Commissioner's intent is in respect of part (a) of the definition of RTP is, and how it is to be distinguished from, part (b) of the definition of RTP.

To the extent an entity's financial statements do not include a contingency or uncertainty of tax liabilities, the Commissioner has many review and audit products at his disposal. Therefore, requiring disclosures of positions falling within parts (a) and (b) of the definition of RTP on the RTP Schedule is a replication of disclosures made in an entity's financial statements and, as such, completion of the RTP Schedule is an unnecessary compliance burden. Where the Commissioner is unable to obtain the information required from the financial statements, the balance of information could be sourced from the extensive taxpayer review and audit program.

The G100 acknowledges that part (c) of the definition requires information additional to that disclosed in the financial statements. However, rather than gathering the required information in an additional schedule focussed on Reportable Tax Positions, the Commissioner's purpose could be better served by including an additional question focussed on transactions with different tax and accounting outcomes in Form C. Notwithstanding the above position, if the requirement that businesses lodge an RTP Schedule is imposed, there should be some discernible benefits apparent to businesses in lodging the RTP Schedule.

The G100 also has a number of concerns with the implementation and disclosure requirements of the RTP Schedule. A significant concern is the Commissioner's access to work papers in support of both disclosures made on the RTP Schedule, as well as the work papers in support of the conclusion certain positions should not be disclosed on the RTP Schedule. We elaborate on this matter further in the attachment. However, we believe that there should be a statutory acknowledgement of Legal Professional Privilege (LPP) in respect of advice sought and received in a tax context. At a minimum, the Commissioner should issue a formal policy acknowledging that disclosures made on the RTP Schedule will not be construed as a waiver of LPP. The G100 is also concerned that the guidance provided does not contain sufficient detail as to how the ATO will administer the RTP schedule and believes that such guidance should be in a form which is administratively binding on the ATO.

The G100 believes that these and many other concerns which are included in Appendix A, should be resolved prior to the broader business community being required to complete the RTP Schedule.

We provide detail of our concerns and recommended resolutions in Appendix A and we welcome the opportunity to discuss this matter further with you.

Yours sincerely
Group of 100 Inc

Peter Lewis
President

APPENDIX A

G100 Submission on Reportable Tax Positions

We refer to the Australian Taxation Office (ATO) requests for feedback and comments on its Reportable Tax Position (RTP) initiative. Specifically, we refer to the RTP Schedule which has been released in draft and is intended to be lodged with the company Income Tax Return. The ATO's request for feedback is contained in the draft Instructions for the RTP Schedule (the "draft RTP Instructions").

Our detailed comments are outlined below and we welcome the opportunity to meet with the Commissioner and/or his delegates to more fully discuss our concerns and views.

INTRODUCTION

The disclosure to revenue authorities of particular tax positions in financial statements to is an important issue for businesses globally. We note the Commissioner refers to the relevant positions as Reportable Tax Positions (RTPs), as opposed to Uncertain Tax Positions (UTPs), which is the term used for financial reporting purposes and in the United States for the purpose of reporting to the Inland Revenue Service. We set out below our understanding of the Commissioner's requirements in relation to reporting RTPs, as well as issues emanating from the Commissioner's proposal and we highlight developments required to promote the introduction of such a reporting regime as being fair, reasonable and not overly burdensome on taxpayers.

DISCLOSURE OF UTPs AND RTPs – A BACKGROUND

In recent years, the requirements surrounding disclosure of UTPs for both financial accounting and tax purposes have evolved. Initially, with the requirement to recognise UTPs for accounting purposes, with FIN 48 which was introduced in the United States (FIN 48 applies for fiscal years that began after 15 December 2006). In accordance with paragraph 6 of FIN 48, the effects of a tax position may be recognised in the entity's financial statements if it is more likely than not that a position will be sustained upon examination. The impact of the requirement to disclose UTPs under FIN 48 was directly felt in Australia (FIN 48 only applied to Australian subsidiaries of American corporations) in early 2009 when the International Accounting Standards Board (IASB) released an Exposure Draft proposing amendments to IAS 12/AASB 112 'Income Taxes', to require disclosure of UTPs.

In January 2010, Mr Doug Schulman (Commissioner of the IRS in the United States) announced a degree of information is required to be disclosed to the IRS in respect of UTPs. The means for making the disclosure is on a form attached to the US Corporation Income Tax Return.

The Australian Commissioner of Taxation announced in May 2011 that certain taxpayers will be required to lodge an RTP Schedule with their company Income Tax Returns (ITRs) for the year ended 30 June 2012, as a pilot project before the requirement is imposed on other taxpayers. The G100 understands that only some taxpayers in the 'Higher Risk Taxpayer' and 'Key Taxpayer' quadrants of the ATO's Risk Differentiation Framework (referred to by the Commissioner as 'higher consequence taxpayers') will be required to complete the Proposed RTP Schedule in the pilot year of 2012.

Additionally, we understand early balancing companies and those entities with a compliance arrangement may be excepted from reporting in the initial year.

PERCEIVED BENEFITS OF DISCLOSING RTPs TO THE COMMISSIONER

The G100 understands the Commissioner's rationale for a regime in which RTPs are to be disclosed is to encourage transparency of the tax affairs of large businesses – taxpayers will in effect disclose the tax effects of individual transactions on a 'real time' basis.

This transparency is in line with a more general and much publicised effort by the ATO to encourage frank and transparent dealings between the large business community and the ATO with the Commissioner saying his "*aim [is] to have an open and cooperative relationship to support [large business] meeting [its] tax obligations*".¹ However, the G100 is of the view that there should be discernable benefits to taxpayers where there is an increased cost of compliance.

Additionally, the move to require disclosure of RTPs is said to be advantageous to both the Commissioner and large business as the disclosure can be a means of obtaining certainty of the correct application of the law. This is in line with the Commissioner's stated objective of the RTP initiative which is to shift the Commissioner's resources to advisory rather than compliance. However, at this juncture there is no clear statement from the Commissioner as to how and when he will bring that certainty to RTPs that are disclosed. In fact, the Commissioner tacitly acknowledges that currently the ATO does not have the resource capability to deliver that certainty in all cases. Further, it appears to have been overlooked that not all RTPs may give rise to an increase in tax liability should the Commissioner successfully challenge the position. Indeed, taxpayers may also disclose RTPs that are to the detriment of the Commissioner (for example, a position where a taxpayer has under claimed deductions or over returned income) – the Commissioner is yet to comment on how he expects to address these RTPs. For example, if a taxpayer makes a disclosure and the ATO has not taken action within six months of the disclosure then it should be deemed that the ATO has accepted the taxpayer's position.

ASSESSMENT AND CRITIQUE OF THE ATO's RTP INITIATIVE

The G100 acknowledges that the Commissioner has sought to involve the taxpayer community in the establishment of the RTP regime and we hope the consultation process is productive for both parties.

Timing of Release: We understand in respect of the year ended 30 June 2012, the RTP Schedule will be required to be completed by 'higher consequence taxpayers'. We oppose this early release prior to the finalisation of the amendments to IAS 12/AASB 112 relating to disclosure of uncertain tax positions because for financial reporting purposes, this presents definitional challenges.

Specifically, the G100 believes that it is inappropriate for the ATO to be requesting detail of RTPs where there is no definitive accounting guidance on the matter. If the ATO proceeds with the RTP initiative prior to the accounting guidance, it will require entities to ultimately disclose two sets of numbers (for accounting and tax) on the same issue with different rules around disclosure.

On the other hand, if the Commissioner postpones his RTP initiative until after the amendments to the accounting standard, a more uniform set of rules for tax and accounting could ensue. Indeed, in the Commissioner's own words:

¹ Page 5, Large Business and Tax Compliance Booklet, 2010

"Currently Australia does not have financial reporting requirements similar to those in the US which require the recognition and measurement of uncertain tax positions. We [the ATO] acknowledge that this raises definitional issues and challenges during the transitional period before the anticipated changes to the Australian financial reporting requirements"².

The G100 believes that the Commissioner should defer the compliance date of the RTP Schedule until after the finalisation of the amendments to IAS 12/AASB 112 relating to disclosure of uncertain tax positions.

Alternatively, we submit that the Commissioner should employ a two year "phase in" period for the pilot RTP program to properly enable initial issues to be fully considered. That is, the Commissioner will in our view be unable to properly review the pilot program and its outcomes until the relevant disclosures for the year ending 30 June 2012 are received. Because most large taxpayers are subject to Tax Agents' lodgement extensions, those returns will not be lodged until the first quarter of 2013. Consequently, any real ATO assessment of the pilot will be unable to conclude until mid 2013 at the earliest. As a result, in our view, the pilot must not be concluded before 2013 and therefore, should not be deployed to the broader taxpayer community in relation to the year ending 30 June 2013.

Application: The Commissioner has announced that those required to complete the RTP Schedule for the 2012 year are only required to include current year RTPs – that is, prospective application. However, the Commissioner has not confirmed that in later years (when the RTP Schedule may well be extended to a broader group of taxpayers) this prospective application will be the case.

The G100 considers that in future, the RTP reporting regime should be implemented on a prospective basis only. We emphasise that it is important not to force the business sector to engage in 'tax archaeology' and trawl through prior year material. Rather, the focus should be on establishing an efficient framework for the reporting of RTPs prospectively which is in accordance with the Commissioner's own objective to a move towards real time reporting of current issues. This is also the implementation approach favoured by the IRS in the United States.

Entities should only be required to report on RTPs arising out of transactions entered into in the current year (not on prior-year RTPs with 'long tails'). The Commissioner should confirm that this will be the case in later years when the RTP Schedule is released to a broader class of taxpayers.

Who will be required to file the RTP schedule in respect of the year ended 30 June 2013 and subsequent years?: The Commissioner is yet to indicate the breadth of the taxpayer group that will be required to lodge the RTP Schedule in respect of the year ended 30 June 2013 and subsequent years. We make the following comments in the absence of guidance as to the future requirement to lodge the RTP Schedule.

² Extract from NTLG agenda and draft responses, Response from ATO received 12 October 2010

While G100 members are likely to be captured by the filing requirements we believe that it would be inefficient and counterproductive to require that all entities file RTP schedules. In addition, there will be a disproportionate impact on small businesses that will require relatively more resources to be allocated to the identification of RTPs for disclosure. A better alternative would be for the Commissioner to consider an entity's size before requiring all entities to complete the RTP Schedule.

The G100 suggests that the Commissioner establish an asset threshold above which RTPs should be reported. This will exclude smaller entities that are immaterial in comparison to large taxpayers. We propose that only taxpayers with net asset holdings greater than \$100 million should be required to report their RTPs.

Definition of RTP: The most recently drafted definition released by the Commissioner of a reportable tax position is:

- a. a material position that is not more likely to be correct than incorrect; or*
- b. a position in respect of which uncertainty about taxes payable or recoverable is recognised and / or disclosed in the taxpayer's or a related party's financial statements; or*
- c. a position in respect of a 'reportable transaction'*

The draft RTP Instructions state that the above elements of the current definition are intended to capture the following.

Paragraph (a) is intended to capture material positions that are 50/50 or less likely to be correct. We understand the taxpayer and the taxpayer's advisors are required to form a reasonable opinion as to whether the position is better than 50/50. Paragraph (b) is intended to capture positions that are uncertain for the purpose of the financial statements of the taxpayer or a related party of the taxpayer.

For the purpose of paragraph (c), 'reportable transaction' is currently defined as a transaction in respect of which the taxpayer recognises more than A\$200 million of income in their financial statements for the current income year and recognises less than 50% of such income as assessable income in the current year; and, the transaction involved a change or changes to the effective ownership or control of an entity (or entities) or asset (or assets).

We submit that the draft RTP Instructions are not detailed enough to enable taxpayers to fully comprehend the current RTP Definition or to complete the RTP Schedule. We set out below our concerns regarding the current RTP Definition and guidance provided in the draft RTP Instructions.

- a. We understand the materiality threshold has been altered from that first contemplated by the Draft RTP Instructions. In accordance with the Consultative Document dated 1 August 2011, a position will be material if the potential adjustment is equal to or exceeds the lesser of \$30 million or 5% of the taxpayer's Australian current tax expense. If 5% of the taxpayer's Australian current tax expense is less than \$1 million, the materiality level is lifted to \$1 million.

We note that in accordance with the Consultative Document, if the taxpayer has an Australian current tax income, the position is material if the potential adjustment is equal to or exceeds \$1 million. Consequently, the ATO is effectively setting a materiality floor of \$1 million.

For those taxpayers with Australian current tax income a materiality floor of \$1 million is likely to capture positions that are not material to the affairs of the taxpayer, thereby unfairly burdening those taxpayers with Australian current tax income.

Given organisations commonly refer to what is current tax income for the purpose IAS 12/AASB 112 as an 'income tax benefit' in their financial statements, for the purpose of this recommendation we have used that terminology.

Rather than requiring that all taxpayers with an Australian income tax benefit (rather than an Australian income tax expense) apply a \$1 million materiality threshold, the G100 recommends the materiality threshold for those taxpayers with an Australian current tax benefit be consistent with the materiality threshold for those taxpayers with an Australian current tax expense. That is, the materiality threshold for taxpayers with an Australian current tax benefit should be as follows: a position will be material if the potential adjustment is equal to or exceeds the lesser of \$30 million or 5% of the taxpayer's Australian current tax benefit. If 5% of the taxpayer's Australian current tax benefit is less than \$1 million, materiality is set at \$1 million.

- b. In respect of paragraph (a) of the definition, the Draft RTP Instructions refer to a taxpayer or the taxpayer's professional advisors forming a reasonable opinion. However, the draft RTP Instructions do not list who constitutes an acceptable professional advisor for the purposes of RTP disclosure. The Commissioner should identify who qualifies as a professional advisor (for example, legal counsel, tax advisors, accountants, lawyers, etc.) and what is required to evidence a 'reasonable opinion' (however we have comments further below on the Commissioner accessing documentation maintained for the purpose of preparing and lodging the RTP Schedule).
- c. Paragraph (b) makes reference to amounts recognised and/or disclosed in the financial statements of the taxpayer or a related party. We note the draft RTP Instructions do not limit 'related parties' to Australian related parties. The G100 recommends the ATO limit 'related parties' for the purpose of paragraph (b) to Australian related parties.
- d. We understand the Commissioner will not require taxpayers disclose prior year RTPs. However, amounts recognised and/or disclosed in financial statements in respect of tax positions often include amounts in respect of prior year positions. As paragraph (b) is not limited to amounts in relation to current year positions, the Commissioner has effectively asked for disclosure in relation to prior year positions to the extent an amount is recognised and/or disclosed in the taxpayer's financial statements in respect of that position. The G100 recommends the Commissioner amend paragraph (b) so as to limit it to amounts recognised and/or disclosed in respect of current year positions.
- e. Paragraph (b) appears to capture 'ordinary' tax provisions. That is, in the ordinary course a taxpayer will provide for unpaid taxes, regardless of whether the position taken is 'uncertain'. The G100 recommends paragraph (b) be amended to carve out amounts recognised and/or disclosed due to the ordinary course of business operations.

- f. The draft RTP Instructions state that RTPs which have "*been otherwise adequately disclosed*" do not require reporting on the RTP Schedule. There is no written guidance on what constitutes "*adequately disclosed*" beyond the Commissioner saying the disclosure must be in writing in a form determined by the Commissioner and acknowledged in writing by the Commissioner. The Commissioner should provide an exhaustive list of types of actions which constitute "*otherwise adequately disclosed*" (for example: a taxpayer having obtained a private ruling on a matter that would otherwise require reporting as a RTP; disclosing information previously in a response to an ATO Request for Information; etc.).

FORMAT AND CONTENT OF THE RTP SCHEDULE

There are a number of aspects to the RTP Schedule which are not explained sufficiently, or not explained at all, in the draft RTP Instructions. We set out those aspects below and our recommendations for clarifying the guidance afforded to taxpayers when completing the schedule.

- The RTP Schedule has a column titled 'RTP number'. However, there are no instructions advising what this column means or how taxpayers should populate this column. The Commissioner should specify in his instructions what 'RTP number' refers to. For example, 'RTP number' may be a ranking of the RTP relative to the taxpayers other RTPs, or it may be an arbitrary number used for referencing purposes only.
- The RTP Schedule has two columns titled 'Concise description' and 'Basis for position' however there are insufficient instructions in relation to the difference between these two columns and / or how their contents may interact. The ATO should specify the difference between 'Concise description' and 'Basis for position'. For example, 'Concise description' may comprise factual elements of a transaction, and, 'Basis for position' may comprise how the tax law was applied technically to a fact scenario.
- There are no examples of a 'Concise description' in the RTP Instructions. Having examples would be helpful to illustrate definitional requirements to taxpayers. We note that there are examples of descriptions of UTPs contained in the IRS Schedule UTP Instructions. The G100 recommends that the Commissioner provide examples of 'Concise descriptions' of an RTP in the RTP instruments.
- We understand that the ATO has announced a suggested 500 word count for the description of a RTP. We believe this is excessive and would be burdensome for taxpayers to draft. A 500-work block implies more than mere identification of the issue; it implies an extensive analysis. The issue for taxpayers would then be whether their disclosure was accurate and comprehensive. Is it the intention of the ATO to implement here a version of the old 'full and true disclosure' of the era prior to self-assessment? Is a taxpayer who sets out the issue in 50 words at risk of being penalised for making an incomplete or misleading statement in their ITR?
- We also note that examples of matters falling within the definition provided by the IRS for the Schedule UTP are significantly shorter (at around 50 words). The G100 recommends that the Commissioner reduce the word limit of a RTP response to 50 words.

- We note that the Schedule UTP published by the Inland Revenue Service in the United States allows for the taxpayer to indicate whether a position leads to a temporary or permanent difference. The RTP Schedule does not allow for a distinction. There is no reference to timing differences between accounting and tax disclosures in the draft RTP Instructions. Lack of recognition of timing differences may result in mismatched or skewed data/reporting.
- The G100 recommends that instances where timing differences (between accounting and tax) may exist should be specifically identified in the draft RTP Instructions.

ENFORCING THE REQUIREMENT TO LODGE THE RTP SCHEDULE

In relation to the proposed definition of an RTP, there is a concern that the Commissioner may take issue with how taxpayers interpret and apply the definition of RTP and, as such, commence reviews to establish whether all RTPs have been included on the RTP Schedule (i.e. to determine whether the taxpayer has met the disclosure requirement or taken an unnecessarily broad view of the definition of RTP). If this is the case, the RTP Schedule would become redundant as the Commissioner would effectively be reverting to conducting broad / general Reviews and Audits.

The G100 recommends that the Commissioner release a Practice Statement outlining when and how he will seek to review whether all RTPs have been disclosed in the RTP Schedule and what evidence taxpayers will be required to produce to demonstrate they have satisfied the reporting requirements. In terms of evidence required of taxpayers, we suggest the Commissioner require evidence of process, rather than evidence of their undisclosed positions. We provide further comment on evidence below under the heading of 'Privilege'.

Privilege: There is a concern that the Commissioner may construe disclosures made on the RTP Schedule (in particular the 'Concise description' and 'Basis for position') as a waiver of Legal Professional Privilege. Further, the Commissioner has not publicised his views on how he intends to apply his policies concerning Legal Professional Privilege and the Accountants' Concession.

The G100 requests the Commissioner have an appreciation for the transparency required on the part of taxpayers by disclosing their RTPs. The G100 strongly believes that LPP in a tax context more generally should be statutorily acknowledged. In the short term (and in the absence of statutory acknowledgement), and at a bare minimum, a conservative adherence by the ATO to the LPP, the Accountants' Concession ("AC") and the Board Work paper Privilege ("BWPP") guidelines. This is more the case with AC and BWPP by virtue of the fact that these privileges are administrative practices rather than a legal right.

In relation to confirming there is no implied or express waiver of the taxpayer's privilege in the RTP process, the G100 requests that the ATO make it clear that it will not assert that a taxpayer has waived any form of privilege (LPP, AC or BWPP) over any aspect of a RTP disclosure. This should extend to situations in which a position disclosed on the RTP Schedule is disputed by the Commissioner and eventually litigated.

The G100 recommends that for dealing with these issues, the Commissioner consider issuing a 'Policy of Restraint' akin to that issued by the IRS in relation work papers.

Formal access gathering powers: We note the Commissioner has undertaken (as discussed in the Extract from NTLG Agenda and draft responses for 18 October 2010) to *not* use formal powers to access taxpayer documentation which supports RTPs.

The G100 recommends that the Commissioner publicly announce his undertaking to not use formal access and information gathering powers when reviewing RTPs in a Practice Statement.

Issues in relation to self-assessment: Elements and application of the following three issues (amendment periods, penalties and interest) have all been determined with reference to the self-assessment regime of taxation in Australia. The RTP Schedule represents a movement away from self-assessment and towards fuller disclosure and as such, the Commissioner should reconsider the application of amendment periods, penalties and interest in relation to the RTP regime.

Amendment periods: Standard periods within which the Commissioner may amend a taxpayer assessment should not apply in respect of transactions disclosed on a RTP Schedule. That is, the Commissioner should be required to finalise his review of transactions disclosed on a RTP Schedule within two years of the schedule being lodged.

As discussed above, one of the perceived benefits of requiring taxpayers to lodge a RTP Schedule is that the schedule can be used as a tool to provide both the ATO and the taxpayer with certainty. This certainty would be diminished if the Commissioner continued to exercise a four year limitation period for amending assessments.

The G100 recommends that the Commissioner institute a policy whereby any reviews of RTPs disclosed in the RTP Schedules are commenced within six months of lodgement of the RTP Schedule and that any amended assessments must be issued within two years of the lodgement of the RTP Schedule. Failure of the Commissioner to do this within the particular time frame should result in the taxpayer's position being accepted as correct.

An alternative approach would be for the Commissioner to deem that a taxpayer's RTP disclosure is a Private Ruling Request (and consequently, if the deemed Private Ruling Request via RTP disclosure has not been considered within two years of the schedule being lodged, then the position is treated as a matter to which a favourable ruling has been provided).

Penalties: There have been no announcements as to the application of penalties in respect of positions disclosed by taxpayers on the RTP Schedule. A taxpayer's RTP disclosure should be taken to be akin to full disclosure and no penalties should later apply should an adjustment be made in respect of that RTP. In particular, it should rationally be accepted by the Commissioner that the disclosure of RTPs can in no way be 'false or misleading' and therefore, the penalties should not apply in respect of amendments.

The G100 recommends that the Commissioner adopt a policy whereby no penalties will apply to taxpayers in respect of adjustments in relation to disclosed RTPs.

Interest: There have not been any announcements as to the application of interest for assessments that are amended as a result of the Commissioner taking a different view to that of the taxpayer in respect of a position disclosed as a RTP on the RTP Schedule.

A reduced rate of interest (that is, lower than the standard Shortfall Interest Charge) should apply to a taxpayer whose assessment is amended as a result of ATO review of a position disclosed on the RTP Schedule. Further, the Commissioner should be accountable for interest following unreasonable delay of the review of the position disclosed as an RTP.

The G100 considers that any adjustment taking place later than 12 months after the lodgement of the RTP Schedule is unreasonable.

The G100 believes that the base rate of interest should apply to taxpayers whose assessment is amended as a result of a review of positions disclosed on the RTP Schedule. In addition, the Commissioner should be accountable for unreasonable delay on his part to review a taxpayer's disclosures in the RTP Schedule (which then results in an amended assessment) in the form of nil interest charges to the taxpayer after 12 months lapses.

LESSONS TO BE LEARNED FROM THE INTRODUCTION OF THE SCHEDULE UTP IN THE UNITED STATES

In the US, the IRS announced the requirement to report UTPs by way of a disclosure schedule which must be attached to particular ITRs lodged by particular classes of companies. Shortly after the release of the draft Schedule UTP, there was criticism from the tax, accounting and legal professions on its contents during the period of community consultation. The IRS conceded many of the points raised, and as a result, the final version of the schedule differed significantly from the original.

We have highlighted the criticisms of the US schedule below (and the subsequent changes before its finalisation) as many of the elements have similarities to the ATO's Proposed RTP Schedule. We believe there is value in considering these similarities and we can apply the "lessons learned" in the US in an Australian context.

- The most significant change from the draft to the final US Schedule UTP was to the definition which was ultimately simplified, streamlined and made more concise.³ Specifically, the draft Schedule UTP originally required a definition, inclusive of subjective comment including the "rationale" and 'reasons' for determining the position is uncertain. Taking into account the many negative comments alleging that the IRS (through this definition) was requesting detail protected by privilege, the IRS revised the definition by no longer requiring the taxpayer to explain *why* a position is a UTP and to state the maximum tax adjustment relating to such a position.⁴ Moreover, the instructions to the Schedule UTP now specifically state that the description is not to include an assessment of litigation hazards or other risk analysis. To assist taxpayers, the IRS included examples of tax positions and descriptions of those positions.⁵
- The IRS has announced that in the course of an examination it would not assert that the taxpayer had waived privilege by producing information in the Schedule UTP.⁶
- The IRS withdrew initial indications that they may have sought penalty legislation. The IRS later asserted that there would be no penalties for non-compliance of Schedule UTP.

³ Froelich, E., "Schedule UTP: The IRS's most aggressive tax position to date", Mondaq Business Briefing, 13 October 2010

⁴ Froelich, E., "Schedule UTP: The IRS's most aggressive tax position to date", Mondaq Business Briefing, 13 October 2010

⁵ Froelich, E., "Schedule UTP: The IRS's most aggressive tax position to date", Mondaq Business Briefing, 13 October 2010

⁶ Froelich, E., "Schedule UTP: The IRS's most aggressive tax position to date", Mondaq Business Briefing, 13 October 2010

We have highlighted the points above as they:

- ~ reinforce our concerns with the ATO's RTP Schedule;
- ~ illustrate that the IRS in the United States had (in its initial formulation of the Schedule UTP) a tendency to overreach in relation to information sought;
- ~ illustrate that the US business community had similar concerns; and
- ~ ultimately 'taken on board' by the IRS.

INTERACTION BETWEEN RTPs AND ATAX CORPORATE GOVERNANCE (TCG)

RTPs are indirectly considered by other forms of risk assessment currently being promoted by the ATO. Specifically, the Commissioner has recently announced⁷ that he will be considering how tax risk is considered and documented, and then, escalated and appropriately managed at the company Board level. This concept is referred to by the Commissioner as having good Tax Corporate Governance.

Given that the ATO currently examines the effectiveness of a company's Tax Corporate Governance (by way of Risk Review and Risk Rating allocation), we consider that it is, in this regard, reviewing whether a company is appropriately able to manage its own tax risks (including RTPs).

We believe that the ATO's focus on good TCG is to allow businesses to consider, escalate and self-manage their tax issues. Requiring additional reporting of these issues appears to be a duplication of the role of TCG. As such, we believe that the ATO should optimise its use of current taxpayer information reporting (that is, through the standard self-assessment system and by continuing to review TCG as a mechanism for good self-management of tax risk) before implementing the disclosure regime.

The G100 believes that a good TCG Framework more than adequately covers the issues raised by RTPs. TCG is an alternative method of RTP review which should satisfy the ATO that RTPs are being managed appropriately (but at a fraction of the cost to taxpayers than if they had to disclose RTPs on the RTP Schedule).

From a systemic and strategic viewpoint, the ATO appears to be considering costly duplication and perhaps further multiplication of compliance initiatives in the overlays of:

- the RTP Schedule;
- the TCG initiative; and
- the ATO's approach of discussing corporate ITRs with taxpayers in pre-lodgement reviews.

The G100 is concerned that the imposition of these multiple overlapping initiatives will result in additional costs, by creating overlapping information supply, which will then need to be reconciled, creating further work for all parties with potentially diminishing returns.

⁷ *Large Business and Tax Compliance* booklet ("the Booklet") which was released in June 2010

CONCLUDING COMMENTS

In its current form, the proposed RTP Schedule constitutes an expansive line of questioning into taxpayers' affairs. While the business community understands the policy intent of such inquiries, we submit that the requirements as currently drafted require further consideration. Additionally, we believe the related instructions to taxpayers for completing the RTP Schedule are incomplete. To require completion of the RTP Schedule without adequate instructions will be overly burdensome to corporate taxpayers who will be required to self-assess the required contents of the Schedule.

Specifically, there are vast 'grey areas' in the draft RTP Instructions which require attention. The G100 is of the view that the draft RTP instructions do not sufficiently provide guidance to taxpayers to enable them to properly understand the definition of a RTP, the practical requirements of completing the RTP Schedule and various associated legal issues.

Our specific concerns are identified above. Because of the foregoing concerns, the G100 recommends that the Commissioner evaluate the intended and unintended consequences of the RTP Schedule on the taxpayer community, amend the RTP Schedule and draft RTP Instructions accordingly, and postpone issuing the final RTP Schedule until the release of the relevant Australian accounting standards in relation to UTPs.

As a minimum, the Commissioner should extend the timeframe for the current pilot program and only roll out the RTP Schedule to the broader taxpayer community when all issues associated with the RTP schedule have had sufficient time to be identified and be satisfactorily addressed.