Schedule UTP reporting is intended to promote certainty, consistency, and efficiency in the administration of tax examinations. As the reporting requirements only began for tax year 2010, it remains to be seen whether these goals will be accomplished. In my experience, to date, the decision in United States of America v. Textron Inc. and Subsidiaries (Textron) and the new Schedule UTP reporting requirement have not significantly changed the manner in which corporations evaluate and document tax positions taken on their tax returns. This may be a surprise, but I believe that the significant behavioral change in planning and documentation occurred upon the adoption of the Sarbanes-Oxley rules with respect to corporate financial reporting, the adoption of FIN 48 (now Accounting Standards Codification 740-10, or ASC 74010), and the transparency initiatives enacted as part of the 2004 Tax Act. Through the combination of these developments, occurring primarily between 2001 and 2006, many corporate taxpayers enhanced their evaluation and documentation with respect to the types of tax positions claimed on their corporate tax returns. Thus, the more likely consequence of Schedule UTP reporting will be a "refinement" to a corporation's existing review and documentation policies to incorporate the specific requirements of Schedule UTP.

While some believed the First Circuit’s Textron decision would significantly alter the balance regarding privilege with respect to tax accrual workpapers, this has not been
the case to date. I believe that at least one reason for this is due to the expansion and confirmation of the IRS’ “Policy of Restraint” relating to requests for tax accrual workpapers. In fact, one could argue that the IRS, in crafting the Schedule UTP reporting, recognized the delicate balance between their ability to request tax accrual workpapers and the potential impact such actions would have on the IRS' efforts to work more collaboratively with taxpayers. The Schedule UTP reporting requirements provide the IRS the relevant information about a corporate taxpayer's uncertain tax positions without having to request tax accrual workpapers, which may contain the taxpayer's legal analysis. Thus, by expanding and confirming its “Policy of Restraint” in connection with the implementation of the Schedule UTP reporting regime, the IRS has signaled its recognition of taxpayers' privilege concerns and has adopted a new disclosure approach that attempts to balance these competing interests.

Although I believe many other jurisdictions will consider adopting a requirement similar to Schedule UTP, non US jurisdictions likely will need to consider a different approach because of differences with respect to accounting for income taxes. This is because the key foundation for the Schedule UTP reporting regime in the United States is financial reporting and the degree of guidance provided under US Generally Accepted Accounting Principles (US GAAP) in accounting for uncertain tax positions. FIN 48 (now ASC 740-10) prescribes a detailed framework for determining unit of account, recognition, measurement, and disclosure for the financial accounting and reporting of uncertain tax positions that is significantly different, and more specific, than under International Financial Reporting Standards (IFRS) or other existing GAAP frameworks. Absent this detailed and consistent framework for the financial reporting of uncertain tax
positions, it is debatable whether other taxing authorities could achieve the goals of Schedule UTP reporting in the same manner as the IRS intends.

Nonetheless, recent developments suggest that other taxing jurisdictions may seek to emulate the US Federal reporting requirements. For example, a few states already require the federal Schedule UTP to be filed with its tax return. Other states are evaluating whether to develop a state-specific uncertain tax position form or merely require the federal form to be filed. Additionally, the Australian Taxation Office (ATO) recently announced that it is developing a new reportable tax position schedule for corporate tax return filings. In announcing the new requirement, the ATO stated that by expecting corporations to disclose uncertain tax positions, "we are acting consistently with wider international trends that require large businesses to be more transparent." As many uncertain tax positions result from multi-jurisdiction transactions, such as transfer pricing, the implementation of comparable UTP reporting regimes in jurisdictions around the world likely will increase the already growing need to engage in bilateral discussions and competent authority claims to avoid double taxation.

In summary, my experience to date is that the US Schedule UTP reporting requirements have not significantly impacted the manner in which corporate taxpayers evaluate and document tax planning, but is altering their approach to managing examinations and controversies. In fact, the increased transparency in US tax reporting, including Schedule UTP, has generally resulted in tax directors reevaluating the benefits and risks, and in some cases adopting collaborative procedures with the tax authorities that can provide certainty on uncertain tax positions sooner (such as the IRS’ Compliance Assurance Program). Finally, while some jurisdictions have begun to evaluate and implement comparable UTP reporting regimes, given the lack of a consistent framework
for the financial accounting for uncertain tax positions it remains unclear to what extent these regimes will produce the benefits expected by the IRS.