Deloitte



March 29, 2007

Mr. Lawrence W. Smith
Director, Technical Application and Implementation Activities
Financial Accounting Standards Board
401 Merritt 7
P. O. Box 5116
Norwalk, CT 06856-5116

Proposed FASB Staff Position No. FIN 48-a, "Definition of Settlement in FASB Interpretation No. 48"

Dear Mr. Smith:

Deloitte & Touche LLP is pleased to comment on proposed FASB Staff Position No. FIN 48-a, "Definition of *Settlement* in FASB Interpretation No. 48" (the "proposed FSP").

We support the Board's amending of FASB Interpretation No. 48, Accounting for Uncertainty in Income Taxes ("Interpretation 48" or the "Interpretation"), to clarify that, in the assessment of an uncertain tax position for subsequent recognition or derecognition, the term "ultimately settled," as used in paragraph 10(b), is not in conflict with the guidance in paragraph 12 that states, "A tax position need not be legally extinguished and its resolution need not be certain to subsequently recognize or measure the position." We believe the proposed FSP's clarifying language will help financial statement preparers understand that the Board, when it issued Interpretation 48, concluded that a liability for an uncertain tax position can be derecognized for the purpose of recognizing previously unrecognized tax benefits before the liability is legally extinguished.

Our understanding of the proposed FSP, and related amendments to the Interpretation, is that the Board is providing guidance regarding judgments and conditions required to conclude that a tax position is effectively settled for the purpose of recognizing previously unrecognized tax benefits before legal extinguishment. In demonstrating effective settlement by way of example, the Board has selected the use of an administrative practice and precedent often applied in the U.S. federal tax jurisdiction regarding the completion of an examination. In doing this, the Board provides a practical solution for treating uncertain tax positions as effectively settled.

Although we do not believe that the completion of an examination changes the technical merits of a tax position or legally extinguishes a tax liability recognized under the Interpretation, we agree that certain tax jurisdictions have widely understood practices and policies of not reopening a completed examination except under certain conditions.

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Accordingly, we agree with the proposed FSP that concluding on the appropriateness of recognizing a previously unrecognized tax benefit requires an evaluation of the facts and circumstances and an application of judgment. However, we believe that certain aspects of the proposed FSP should be clarified to be consistently understood. We discuss these clarifications in the attached Appendix.

We appreciate the opportunity to comment on the proposed FSP. If you have any questions concerning our comments, please contact Randall Sogoloff at (203) 761-3777 or Tim McKay at (415) 783-5366.

Yours truly,

Deloitte & Touche LLP

cc: James Johnson

Appendix

Comments on Proposed FSP

The proposed FSP, by inference rather than statement, concludes that a completed examination, in and of itself, would not provide sufficient information to conclude that recognition of all previously unrecognized tax benefits should be recorded. The proposed FSP leaves unclear under what circumstances a completed tax examination might translate into the effective settlement of all tax positions within the examination period and what circumstances may lead to effective settlement of some but not all tax positions within the completed examination period. For example, paragraph 3 indicates that an enterprise could conclude that all positions in a particular tax year can be effectively settled, yet the guidance throughout the document focuses on individual tax positions. In addition, when a tax position no longer meets the conditions to be considered effectively settled, it is unclear to us whether that would apply to every tax position within the period examined or just that particular tax position. We believe the proposed FSP should state definitively that management's judgment is required when evaluating and concluding whether individual tax positions included within the completed examination period meet all conditions of a taxing authority's widely understood policies not to reopen completed cases in order for an enterprise to recognize previously unrecognized tax benefits.

Paragraphs 4 and 5 of the proposed FSP establish a framework for enterprises to consider when determining whether a tax position has been effectively settled on the basis of the administrative practices and precedents of a taxing authority after a completed examination. We do not believe that the conditions stated in subparagraph 5(a) and 5(b) are necessary to provide an administrative practice and precedent for the previously unrecognized benefits after the completion of an examination. Those conditions appear to specifically address administrative policies of the U.S. Internal Revenue Service (IRS) and may not be relevant to other taxing authorities. We believe those conditions should be included in the examples to illustrate when an examination is considered complete.

We recommend that paragraphs 4 and 5 be modified as follows:

4. For purposes of applying paragraph 10(b) of Interpretation 48, a tax position is effectively settled if the taxing authority has completed its examination of a tax year to which the tax position relates and the enterprise considers it remote that the taxing authority would subsequently reopen the completed examination or examine or reexamine any aspect of the tax position included in the completed examination. To conclude that it is remote that the taxing authority would subsequently reopen the completed examination or examine or reexamine the tax position included in the completed examination, an enterprise should evaluate all available information, including the taxing authority's administrative practices and precedents, if any, relating to tax positions included in years for which

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examinations have been completed, presuming the taxing authority has full knowledge of all relevant information.

5. A tax position does not need to be specifically reviewed or examined by the taxing authority to be considered effectively settled through examination. An enterprise can conclude that all positions in a particular tax year may be effectively settled if the individual positions included within that year are effectively settled upon completion of an examination covered in a jurisdiction based upon a taxing authority's widely understood policy to not reopen a completed examination period. Tax positions that are excluded by the enterprise and tax authority from the completed examination are not effectively settled. Management judgment is required to evaluate tax positions included within the completed examination period to ensure that each position meets the conditions of a taxing authority's widely understood policy not to reopen completed cases in order to conclude that those tax positions are effectively settled.

We recommend that the final FSP use a term other than "highly unlikely" when assessing the probability that the taxing authority will reopen a completed tax examination. Because generally accepted accounting principles (GAAP) already contain numerous thresholds, we believe that introducing a new threshold of "highly unlikely" increases, rather than reduces, the complexity of accounting standards. As we understand it, the Board's intent was to describe a threshold that is higher than "probable," as used in FASB Statement No. 5, Accounting for Contingencies. Accordingly, we recommend replacing "highly unlikely" with "remote," which would refer to an existing threshold in GAAP.

Regarding the likelihood that a taxing authority will reopen a tax position included within a completed examination, we believe the final FSP should state that the enterprise should focus on the nature of the tax position (i.e., transfer pricing) and the specific circumstances under which the position can be reopened rather than on the type of settlement agreement entered into with the taxing authority (i.e., Form 870).

We interpret paragraph 6 as requiring enterprises to continually evaluate tax positions that have satisfied the conditions to be considered effectively settled until the statute of limitations for the relevant taxing authority to reopen the position has lapsed. However, as written, paragraph 6 indicates that the evaluation should only be performed if the enterprise becomes aware that the taxing authority may examine or reexamine the tax position. We believe that the evaluation should be performed on each balance sheet date, not just when the enterprise possesses knowledge of the taxing authority's potential actions. Furthermore, we believe that the evaluation should take into account a change in an enterprise's intent to reopen the tax position through litigation or means.

We do not believe paragraph 7 is necessary because Interpretation 48 is clear that use of a past administrative practice and precedent does not affect the technical merits of a tax

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position. However, if the Board concludes that paragraph 7 is necessary for emphasis, we recommend modifying the paragraph as follows:

The enterprise's determination that a tax position has been effectively settled does not provide new information that would change the assessment of the technical merits of the tax position or any other tax position within the particular period examined or a tax position in any other period.

Comments on Examples

Example 1

In this example, it is not clear to us why Enterprise X would conclude that the taxing authority has completed its examination procedures, permitting Enterprise X to effectively settle Tax Position C when recognizing previously unrecognized tax benefits. We recommend that, in this example, the Board either (1) state that Tax Position A, by mutual consent of the taxing authority and enterprise, was excluded from the completed examination, and therefore, that additional information is required for the position to meet the effective settlement criteria of the proposed FSP, or (2) change the conclusion to indicate that the examination is not complete until the oversight committee has completed its evaluation of Tax Position A.

Example 2

In the "Evaluation" section, we recommend changing the phrase "evidence obtained through the examination process" to "the evaluation of new information made available through the examination process or other sources." This would conform the language to paragraph 12 of Interpretation 48 and would not limit the new information to that received through the examination process.

Example 3

We recommend removing the second sentence from the sixth bullet point of the "Fact Pattern," since it is not relevant to the taxing authority's widely understood policy or Enterprise Z's evaluation process, and thus, may cause confusion.

Given the fact pattern, we agree with the evaluation in Example 3; however, this fact pattern is not a real-life situation for the IRS. The IRS has an administrative policy not to raise new issues in appeals without having "substantial grounds" (i.e., the appeals officer believes that the government will prevail if the case is litigated).

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