

Letter of Comment No: 83
File Reference: 1215-001
Date Received: 9/12/05

September 12, 2005

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File Reference 1215-001 – Accounting for Uncertain Tax Positions – an Interpretation of FASB Statement No. 109

We appreciate the opportunity to comment on the Financial Accounting Standard Board's (the "FASB" or "the Board") Exposure Draft of the Proposed Interpretation of Statement of Financial Accounting Standards No. 109 (SFAS No. 109), "Accounting for Uncertain Tax Positions" (the "Proposed Interpretation" or "Exposure Draft").

We agree with the FASB that there is divergent practice with respect to accounting for tax-advantaged, tax-motivated transactions or tax positions for which there clearly is uncertainty with respect to the application of the law, and we support the FASB's goal of seeking to provide a consistent accounting model and enhanced disclosure for such transactions. However, in summary we believe that implementation of Proposed Interpretation as written to address all uncertain tax positions will be an overly arduous process resulting in an unnecessary financial drain on reporting enterprises of the size of Exelon Corporation ("Exelon"). As written, the scope of the Proposed Interpretation would require, for essentially every element of a tax filing for every open period for which there is more than one plausible interpretation, an evaluation under the requirements of the Proposed Interpretation, a technical conclusion reached and documented and a related positive assertion that the conclusion is probable of being correct on solely its technical merits. These tax interpretations do not occur exclusively when an entity has engaged in a tax-motivated or tax-advantaged transaction, but more frequently during the normal course of everyday business. If this is the FASB's intent, we believe this guidance will result in an unreasonable financial burden for enterprises to comply with the standard with no offsetting additional benefit. We believe that the FASB should limit the scope of the proposed accounting model to specific transactions that are tax-motivated, tax-advantaged, of a non-recurring nature and require a high degree of interpretation. By so doing, the FASB will address the great majority of exposure that exists as a result of inconsistent accounting for tax uncertainties and not place an undue economic burden on reporting enterprises.

The following are our specific comments as it relates to issues 1, 2 and 11. We will not comment on the other issues in the forepart of the Proposed Interpretation.

Issue 1) Scope:

Paragraph 4 defines the scope as “all tax positions accounted for in accordance with Statement 109” and 5 defines the term *tax position* as “an individual filing position in a previously filed tax return or an expected filing position reflected in measuring current or deferred income tax expense or benefit for interim or annual periods prior to filing a tax return.”

As the guidance is written, we interpret the scope to encompass every element of a tax filing that is subject to more than one interpretation and where differing interpretations would result in different amounts of tax. Paragraph 6 of the Proposed Interpretation then requires an enterprise to “initially recognize the financial statement effects of a tax position when that position is probable of being sustained on audit by taxing authorities based solely on the technical merits of the position.” Therefore, it is our interpretation that in order to implement the proposed guidance, reporting enterprises will first have to identify every element of a tax filing which is subject to more than one interpretation and secondly, make a positive assertion that the interpretation taken by the reporting enterprise is probable of being sustained.

In order to make a positive assertion, reporting enterprises will have to create internal documentation, akin to internal “should prevail” opinions, for every element of every tax filing that remains open to adjustment under the statute of limitations. We believe that this evaluation would be required not only for those areas of recognized uncertainty, but for routine business transactions for which, as a practical matter, there is little or no controversy. For example, under our reading of the Proposed Interpretation, we would be required to conduct and document a full analysis of the technical support behind every deduction in a tax return, including such routine items as salaries and wages. While we would expect to conclude that it is probable that the vast majority of those items would be sustained, the effort involved in the formal evaluation and documentation necessary to make the “positive assertion” would be enormous.

Because of what we perceive as an overly broad definition of a “tax position” in the Proposed Interpretation, we believe that a reporting enterprise comparable in size to Exelon has literally thousands of such positions on an annual basis. These positions in large part relate to routine, recurring transactions that are part of ongoing business and not due to tax-motivated or tax-advantaged transactions. While we believe that the positions we have taken are correct and will continue to be sustained upon an audit, the accounting model proposed would require a full inventory and assessment of every tax position regardless of whether it has been previously challenged. In addition we would be required to inventory and assess all judgments that have been made regarding the

filing of tax returns in certain state jurisdictions. As such, we believe that the effort that will be required to implement the standard will be monumental and require a significant amount of resources and capital with minimal economic impact.

If our understanding of the scope of the Proposed Interpretation is consistent with the FASB's intentions, we want the FASB to understand it will impose an unreasonable economic drain on reporting enterprises such as Exelon. Moreover, we believe the effort required to implement the proposed guidance will strain – to the point of exhaustion – the qualified tax resources in every jurisdiction.

Paragraph 9 Limitations:

Paragraph 9 provides examples of how to apply the proposed recognition model, specifically citing examples of 'positive' evidence to be considered. However, we believe that certain aspects of Paragraph 9 are not meaningful.

Paragraph 9a. of the Proposed Interpretation uses the term "unambiguous tax law". It is often case that tax law is ambiguous, subject to interpretation. We believe the practical application of this guidance is limited.

Paragraph 9c. of the Proposed Interpretation attempts to limit the scope of positions for which uncertainty exists by inferring that positions that have been "obviously presented" and not challenged should possess a high degree of likelihood of being sustained. We believe that the FASB needs to further define term "obviously presented." It is often the case that certain positions are not reviewed in detail during an audit and therefore could be inferred to not be "obviously presented." The Proposed Interpretation as written infers that a position cannot be considered to have been "obviously presented" unless it is reviewed and presented directly during an audit. We believe that this guidance will not be meaningful and should be clarified further.

Proposal:

We believe that the FASB would meet its objective of providing a consistent accounting model for tax positions that have uncertainty by limiting the scope of the proposed guidance to transactions that have uncertainty, such as tax-advantaged, tax-motivated transactions or tax positions for which there clearly is uncertainty with respect to application of the law or transactions that are clearly being challenged by the IRS. We propose that the FASB limit the scope of the Proposed Interpretation to transactions out of the normal scope of the entity's operations, of a non-recurring nature, with little or no impact on consolidated pre-tax income, involving the use of tax-exempt entities or entities that have tax attributes the benefit of which may otherwise expire unused, is of a type for which a company would generally seek a tax opinion letter on the sustainability of its position, or other such factors. In short, we believe the scope of the Proposed Interpretation should be limited to items that are clearly the subject of potential

controversy between a taxpayer and the taxing authorities. We understand this guidance would be difficult to apply in a rule-based standard, and that it would need to be applied in principle. However, certain of the Big 4 accounting firms currently apply an accounting model in their internal accounting guidance similar to that described in the Proposed Interpretation, limited to transactions with the characteristics described herein, which we believe is workable.

We believe that there is a need to provide a simplified, consistent accounting model for tax positions that have clear uncertainty and are tax-motivated. Limiting the scope of the accounting guidance to transactions embodying characteristics such as the ones suggested above would encompass the large majority of exposure that currently exists for under-reserving of uncertain tax positions and avoid the unreasonable and uneconomical economic drain that would result from the accounting guidance currently written in the Proposed Interpretation.

Issue 2) Initial Recognition:

In general, we do not agree with an asset-based standard for the recognition of uncertain tax positions that are not tax-motivated or tax-advantaged. We believe that the guidance issued in FAS 5 for loss contingencies is appropriate and effective for general tax obligations. Exelon does however agree that a stricter standard for recognition, consistent with an asset-based standard, should be applied to tax-motivated or tax-advantaged transactions.

Additionally, Exelon believes that applying the proposed asset-based criteria to income taxes would be inconsistent with the accounting for other taxes. If a higher threshold for recognition of tax benefits is required for taxes imposed under a system of self-compliance, this standard should not be limited solely to income taxes. Companies file a significant number of non-income based tax returns that are based on self-compliance and subject to interpretation and audit. Exelon in no way proposes that this Proposed Interpretation or any other be issued to address these types of taxes. However, we do wish to point out that the issues that are being addressed in this Proposed Interpretation exist in several other forms of taxes and other fees. FAS 5 has been and continues to be an appropriate standard for these matters. We do not see the need for differentiation of one type of loss contingency under FAS 5 from all other loss contingencies of a similar nature.

Paragraph 6 of the Proposed Interpretation states that a tax position shall be recognized when the position is “probable of being sustained on audit by taxing authorities based solely on the technical merits of the position.”

The term based “solely on the technical merits of the position” is not clear. By matter of practice, tax positions involve interpretation of both law and facts, for example, whether a transaction has “economic substance.” Whether a transaction does have economic

substance is inherently a factual question that cannot be resolved purely on its “technical merits.” As such we are uncertain how one might apply the proposed guidance in a practical setting. Thus, we propose that the FASB delete the phrase “solely on the technical merits of the position” and replace the phrase with words such as “all the available evidence.”

We do not believe that the paragraph 6 requirement that a position must be sustained “on audit” is the appropriate level at which to evaluate an issue. In most jurisdictions, an audit is a taxing authority’s first level of review of a taxpayer’s affairs. The finding of the auditor is not the final determination of the taxpayer’s liability; to the contrary, it is a very early step in that determination. For example, a taxpayer may usually file an administrative appeal of the auditor’s finding and may ultimately pursue litigation and subsequent appeals to resolve an issue. In recognition of the number of steps that may be required to resolve a particular issue, we suggest that the “on audit” language of paragraph 6 be amended to refer to “upon ultimate resolution.”

Additionally, we believe the FASB should provide clear guidance on what the term “probable” is intended to mean. The term probable used in a FAS 5 context has had a significant range of use in practice. Although we understand that generally an entity interprets this to mean a likelihood of 70% to 90%, we believe that this is too broad a range to leave open to judgment. If the FASB’s goal to simplify and provide consistent guidance, then providing a definition of the term “probable”, a range of percentages intended to meet the terms, should be provided by the Board.

Paragraph 8(b) states as one of the criteria for subsequent recognition of a position initially not recognized that the “matter is ultimately resolved through negotiation or litigation with the tax authority”. The FASB should provide further guidance as to when this condition is met, whether this condition is met when a receipt of a decision of the Tax Court/District Court, Court of Appeals, etc. is received, when a final document from the IRS is received, upon a “probable” assessment of the likelihood that such documents will be received, or upon some other threshold.

Additionally, applying the criteria established in the Proposed Interpretation as it relates to new tax laws which reduce income taxes through the ability to earn credits or utilize new deductions would either result in those benefits not being reflected in the income statements of the reporting entity for a number of years, or an entity would be required to incur costs to obtain a tax opinion to support the application of a new tax law. This is due to new tax laws generally being subject to some level of interpretation. These new laws would generally not meet the unambiguous tax law criteria in paragraph 9(a) nor would they meet the prior years tax return criteria in 9(c) or legal precedent taken by other taxpayers in 9(d). We do not believe that this is the intent of the FASB, to have an entity incur additional costs of a tax opinion in order to account for a new tax law, based on this Proposed Interpretation.

Issue 11) Effective Date

We propose that the guidance, as written, be deferred indefinitely until further scope limitations or clarifications are made. Otherwise, we are not in the position to estimate the time and effort required to implement the proposed accounting guidance although we are certain that it could not be properly implemented as of December 31, 2005. With further clarification, we believe that a consistent accounting model for non-routine, tax-advantaged, clearly defined uncertain tax positions, could be implemented as of December 31, 2005, but we would need to review the revised interpretation before concluding.

Thank you for your consideration of our views. Again, we applaud the Board's goals in terms of simplification and consistency and believe that the accounting model being proposed, in general, would work towards achieving these goals if the issues we perceive with respect to scope and recognition are addressed.

Sincerely,

/s/ Matthew F. Hilzinger

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