



Letter of Comment No: *A*
File Reference: FSPFAS109

Financial Reporting Advisors, LLC
53 West Jackson Boulevard, Suite 1062
Chicago, Illinois 60604
312.588.1690
www.FinRA.com

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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

Re: Proposed FASB Staff Position No. 109-b, Accounting and Disclosure Guidance for the Foreign Earnings Repatriation Provision within the American Jobs Creation Act of 2004 (FSP No. 109-b)

Dear Mr. Smith:

We appreciate the opportunity to comment on the referenced document.

We support the issuance of the Exposure Draft as a final FASB Staff Position (FSP) but offer the following comments to clarify the guidance in the Exposure Draft.

Paragraphs 1, 2, and 10. We recommend that the phrase “special one-time deduction” be replaced with the phrase “limited time deduction,” as we believe this provision applies to all qualifying dividends made within the defined time period.

Paragraph 1. We recommend changing the parenthetical “(repatriation provision)” to “(repatriation clause),” as the term “provision” is often used to describe income tax expense for a period and thus the use of the term “repatriation provision” can be confusing in the context of this FSP.

Paragraph 3. We recommend that the end of the first sentence be changed from “a foreign investment” to “a foreign subsidiary or foreign corporate joint venture that is essentially permanent in duration (a foreign investment)” to ensure that the guidance in this FSP is not mistakenly thought to apply to a foreign investment that is accounted for using the equity method of accounting but is not a corporate joint venture.

Paragraph 6. We recommend that the FASB staff be clearer as to whether this conclusion is an interpretation of the requirements of Statement 109 and Opinion 23 or whether this conclusion is a practical exception that is being made to the requirements of Statement 109 and Opinion 23. Unless the “additional clarifying guidance” is in the form of “legislative regulations” (see Attachment 1 for our

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understanding of legislative as compared to interpretative regulations), we believe that this conclusion is a practical exception to the requirements of Statement 109 and Opinion 23. However, without an explicit statement to that effect, we are concerned that analogies may be made to this conclusion in the future notwithstanding the guidance in paragraph 10 of the FSP.

Paragraph 11(a). We believe it would be useful to include the phrase “as it applies to the enterprise” after the phrase “A summary of the repatriation provision.”

Paragraph 11(c). The inference from this disclosure requirement is that an enterprise's determination of its plan for reinvestment or repatriation of foreign earnings after the date of the balance sheet is a “Type II” subsequent event. The auditing literature that addresses subsequent events (AU Section 560) states that “The second type consists of those events that provide evidence with respect to conditions that did not exist at the date of the balance sheet being reported on but arose subsequent to that date.” This situation could be argued to be similar to an enterprise deciding to sell a long-lived asset subsequent to the date of the balance sheet. Pursuant to the guidance in FASB Statement No. 144, *Accounting for the Impairment or Disposal of Long-Lived Assets*, such a decision subsequent to the date of the balance sheet does not change the asset's classification at the balance sheet date from held and used to held for sale. However, on balance, we believe this situation to be closer to a contingent liability for which a confirming event occurs subsequent to the balance sheet date but prior to the release of the financial statements. In other words, it appears to us that the enterprise's determination of its plan for reinvestment or repatriation of foreign earnings after the date of the balance sheet is better described as providing additional evidence with respect to conditions that existed at the balance sheet date—a Type I subsequent event. We also recommend that the FASB staff consider the SEC staff's views as expressed in EITF Abstracts, Appendix D, Topic D-86, *Issuance of Financial Statements*. In Topic D-86, the SEC staff states its view that registrants are required to amend financial statements not yet filed with the Commission for any material “events or transactions that existed at the date of the financial statements” that are discovered prior to filing those financial statements with the Commission.

If the FASB staff's intent was to provide a practical exception to the requirement to reflect the effect of this Type I subsequent event in not-yet-issued financial statements, we believe that intent should be explicitly stated in the body of the FSP, not simply inferred from a footnote disclosure requirement.

We would be pleased to discuss our comments with the FASB or the FASB staff at your convenience.

Very truly yours,

Financial Reporting Advisors, LLC

Attachment

Excerpt from CCH's Accounting Research Manager

27-1. Changes in Tax Law

A. If corporate tax law changes (for example, tax rates) include retroactive provisions, in what period should the change in tax law be reflected?

Response: Statement 109 requires that the effect of changes in tax law (including the effect of any retroactive changes) be reflected in income from continuing operations for the *period that includes the enactment date*. [In the United States, the enactment date is the day the president signs the legislation.] Therefore, all enterprises with calendar year-ends, regardless of when they adopted Statement 109, should have included the effect of the 1993 change in tax law in income from continuing operations for 1993. Enterprises with fiscal year-ends other than calendar year-ends were similarly affected if the enactment date of the tax law change (August 10, 1993) was subsequent to the first day of the enterprise's 1993-94 fiscal year. The FASB staff made an announcement at the March 16, 1993 EITF meeting reiterating this position (see Topic D-30, "Adjustment Due to Effect of a Change in Tax Laws or Rates" in Appendix D of the EITF Abstracts).

B. Do the provisions of paragraph 27 of Statement 109 apply only to changes in law or are new IRS regulations also covered?

Response: Paragraph 27 clearly covers all changes in tax laws or rates. However, IRS regulations are somewhat different. Generally, changes in IRS regulations or issuances of new regulations are interpretative or are clarifications of the existing law. In such a case, issuance of a regulation after the balance sheet date but before issuance of the financial statements should be considered a confirming event of the provisions of the tax law that were in effect at the balance sheet date; therefore any adjustments to the tax balances resulting from the issuance of these regulations would be reflected in that balance sheet. There are exceptions to this general rule. Sometimes Congress will authorize the IRS to determine and issue final regulations related to certain issues. As such, these new regulations are considered legislative regulations versus interpretative regulations. Legislative regulations should be considered similar to a change in tax law and therefore, the effect of the change should be recognized in the period in which the new regulations are finalized and issued.

Other forms of tax clarification are Private Letter Rulings and case law. Private Letter Rulings are typically issued by the IRS to a specific company covering a specific transaction or situation. Both Private Letter Rulings and case law should be considered interpretative and therefore treated as confirming events and handled similar to the interpretative regulations discussed above.