

Letter of Comment No: 96

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Technical Director
Financial Accounting Standards Board
401 Merritt 7
P.O. Box 5116
Norwalk, CT 06856-5116

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RE: Proposed Interpretation - Accounting for Uncertain Tax Positions

We are pleased to comment on the Financial Accounting Standard Board's (FASB) Proposed Interpretation of Statement No. 109, "Accounting for Uncertain Tax Positions". We support the Board's objective of clarifying the criterion with which to evaluate uncertain income tax positions in regards to initial recognition, measurement, and derecognition with the intent of improving consistency and comparability of financial reporting. We believe the dual threshold and the absence of absolute clarity in certain regards in the proposed Interpretation may not result in the achievement of these objectives. We encourage the Board to consider our comments in its final deliberations.

Probable Threshold

We believe that the criteria used for establishment of both a threshold and the measurement of a tax benefit should be one that produces accounting results that are consistent with the expected outcome. Paragraph 6 of the proposed Interpretation requires that an entity only recognize the benefit of a tax position that has been assessed as "probable of being sustained upon audit by taxing authorities based solely on the technical merits of the position". Reference is made in the proposed Interpretation to the term probable as defined by Statement of Financial Accounting Standards (SFAS) No. 5 to mean "the future event or events are likely to occur". Paragraphs 9 and B19 of the proposed Interpretation liken the term probable to the confidence level generally associated with a should prevail tax opinion. We recognize that current interpretations and accounting practices do indeed vary leading to the diversity that the proposed Interpretation strives to eliminate. We also understand the should prevail tax opinion terminology, while equally vague as the term probable, is generally perceived to equate to a 70% - 75% confidence level. However, we believe the proposed Interpretation falls short of achieving its intended clarity in this regard as an explicit definition of probable is not provided. Thus, we are uncertain as to how uniformity in practice will be achieved if this proposed Interpretation fails to clearly define this term.

We also believe that further clarification of "probable of being sustained upon audit by taxing authorities" should be provided. Taxing authorities routinely challenge tax positions in an audit however, they are not always judged to be correct in their interpretation of the tax law. Paragraph 9

states "legal precedent ... favorably resolved through litigation with taxing authorities" may be an example of demonstrating a probable level of confidence. We believe this type of situation should not necessarily result in the failure to achieve the probable recognition threshold. However, in a situation with no legal precedent, and in the event a taxing authority is subsequently judged to have incorrectly interpreted and challenged a position, the proposed Interpretation will lead to increased earnings volatility.

Additionally, given that the highest level of confidence recognized by the federal tax Code is *more likely than not* (defined by Treasury Regulations § 1.6662-4(g)(4) to mean a greater than 50% likelihood that a tax position will be sustained upon audit), we are concerned that requiring a *probable* level of assurance for recognizing the benefit of a tax position in financial statements will further exacerbate confusion between financial statement and tax reporting as the recognition standard in the proposed Interpretation will not be aligned with the Code or with the current practices of taxing authorities. We agree with the views of the two Board members who were concerned that the provisions of this proposed Interpretation (i) would be unduly complex; (ii) would prove difficult to apply in practice; and (iii) would result in a systematic overstatement of tax liabilities. The establishment of a probable recognition threshold will result in the imposition of an asset-based recognition approach that is contrary to the current liability-based recognition approach pursuant to SFAS No. 5 which we believe to be more appropriate. An asset-based recognition approach will result in an overstatement of tax liabilities. This overstatement of tax liabilities will lead to increased earnings volatility and will needlessly confuse the financial statement reader.

We believe a more appropriate threshold for the recognition of an uncertain tax position in financial statements is a *more likely than not* confidence level threshold that is consistent with the Code (and is consistent with the proposed Interpretation's derecognition threshold). This is a confidence level threshold that will render greater consistency and comparability. It will be less complex and therefore less costly to implement. Most importantly, a *more likely than not* confidence level threshold would produce accounting results that come closest to the expected outcome. In paragraphs 95 through 97 of SFAS No. 109, the Board compared the use of a *probable* standard and a *more likely than not* standard in the context of the recognition of deferred tax assets. The Board chose the *more likely than not* standard. We urge the Board to consistently apply that logic in this proposed Interpretation.

We agree with the *best estimate* measurement criterion required under the proposed Interpretation. However, if the current *probable* recognition threshold requirement is maintained in the final Interpretation, we feel additional explicit guidance is necessary concerning the level at which a *best estimate* amount will indicate that the *probable* assertion has not been met.

We agree with the Board's comment that tax law is subject to significant and varied interpretation and in some cases whether a tax position will ultimately be sustained may be uncertain. We also agree with the merits of an evaluation process that considers applicable tax law, legal or other expert provided tax opinions, previous experience with similar tax return positions and legal case law precedence. We believe, however, the ambiguity in the tax law does create a possibility for the taxing authorities to change their view of the application of a particular section of the law. The current tax system environment, with its inherent levels of imprecision and uncertainty, does not lend itself to the establishment of a financial statement benefit measurement process that is predicated on a *probable* level evaluation process. A probable recognition threshold presupposes that all tax issues have a right

and a wrong answer. This is simply not the case. Our complex system of taxation has created many areas where reasonable people can disagree as to the correct interpretation of the statute. The ambiguities of tax law application and related practices also become particularly evident when considering state tax laws and related practices where clear guidance is often lacking.

Thank you for your consideration of our views. We appreciate the opportunity to share our thoughts on this important FASB proposal. If you would like to discuss our views, please feel free to contact me.

Sincerely,

David J. DeBrunner

Chief Accounting Officer and Bancorp Controller