Letter of Comment No: 59 File Reference: 1215-001

Date Received:

9/12/05

HARRIS CRAMER LLP
Attorneys At Law

HC

1555 Palm Beach Lakes Boulevard, Suite 310 West Palm Beach, FL 33401-2327 Tel: (561) 659-7005 Fax: (561) 659-0701 www.harriscramer.com

Daryl B. Cramer, Esq. dcramer@harriscramer.com

September 12, 2005

### VIA EMAIL: director@fasb.org

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

Attention: Technical Director

Re: File Reference 1215-001

Proposed Interpretation on Accounting for

**Uncertain Tax Positions** 

#### Ladies and Gentlemen:

The Financial Accounting Standards Board recently released a Proposed Interpretation of FASB Statement No. 109, Accounting for Income Taxes. On behalf of clients who may be affected by FASB 109, we disagree with several aspects of the Proposed Interpretation and have prepared this comment letter to summarize our clients' views.

#### Background

The standard for recognition by the Proposed Interpretation is that a tax position is "probable" of being sustained in an audit (including settlement of appeals or litigation) by the relevant taxing authority. On the other hand, previously recognized benefits that no longer meet the probable threshold shall be derecognized in the period in which it is determined that it falls below a "more likely than not" standard that the tax position would be sustained on examination.

# There Should Be a Single Standard of More Likely Than Not

A professed aim of the Proposed Interpretation was to simplify the diverse approaches that companies currently use in accounting for uncertain tax positions. The creation of a binary system in which there is one standard for taking a position and another for reversing the position does little to further this goal. There should be a single standard and it should be more likely than not.

When a professional tax advisor provides a formal opinion on the merits of a taxpayer's return position, the adviser usually expresses it in terms of where the position falls along a hierarchical spectrum of "tax opinion" confidence levels. At the low end of the scale is usually "reasonable basis" – the lowest opinion needed to avoid a negligence penalty. For items such as a "marketed" opinion as defined by the new Circular 230 regulations, the opinion must provide that the taxpayer will prevail on the merits at a confidence level of at least "more likely than not" – a confidence level greater than 50 percent. More likely than not is the highest standard recognized and required under the Internal Revenue Code, including the changes made by Circular 230. Even though several other standards (e.g., substantial authority) correspond with particular statutory or regulatory safe harbors from penalties, none represent a confidence level higher than "more likely than not." While tax accounting sometimes diverges from "book" accounting, there seems to be no policy reason from using a different standard here.

While not mentioned in the draft, the Proposed Interpretation seems to reflect the efforts by FASB to make it more difficult for large corporations like Enron Corp. to overstate their earnings by taking aggressive tax positions. The effect of Enron's reporting on the tax benefits of various transactions was apparently for the purpose of increasing book earnings and thereby propping up its stock price. Enron took aggressive tax positions on the basis of legal opinions from several large, well-know law firms that it "should" obtain the desired tax results. The "should" opinions were designed to meet the "probable" FASB standard for reporting the tax benefit. In light of the fact that Enron was using the "probable standard" prior to the Proposed Interpretation, it is unlikely that the Proposed Interpretation would have had any effect in preventing the debacles that occurred or will prevent such occurrences in the future.

Therefore, because (i) "more likely than not" is the highest standard required and recognized by American tax law and (ii) the probable standard is unlikely to deter future Enrons, we believe that "more likely than" not should be the single standard for both recognizing and derecognizing tax benefits.

## The Probable Standard Should Not Apply to Foreign Jurisdictions

Many United States issuers have offices in foreign locations and file tax returns in those jurisdictions as well. Even if you are not inclined to change the Proposed Interpretations to United States tax positions, we do not believe the "probable" standard should apply if a foreign jurisdiction is involved. This is particularly true if such foreign jurisdiction uses a standard other than "probable." As stated above, the "probable" recognition threshold is a criterion that must be met to establish that a tax position is "probable" of being sustained by the relevant taxing authority, including foreign authorities.

<sup>&</sup>lt;sup>1</sup> See testimony of Philip C. Cook before the Senate Finance Committee, Oct. 21, 2003, 2003 TNT 204-34; James R. Browne, <u>Financial Reporting for Uncertain Tax Positions</u>, Project: Uncertain Tax Positions, <u>at http://www.fasb.org/ocl/1203-UTU/32125.pdf</u> (November, 2004).

Financial Accounting Standards Board September 12, 2005 Page 3

First, if a foreign taxing authority would sustain a tax position using a standard different than "probable," then that standard should suffice. Second, trying to apply a standard such as "probable" to a foreign jurisdiction could be fairly complex. The Proposed Interpretation did not set forth a bright line percentage under which the standard would be met. Determining when a United States taxing authority meets such an imprecise standard will be difficult enough. To require companies to make the same determination for a foreign jurisdiction would be even more cumbersome.

Therefore, we believe that the "probable" standard should not apply if a foreign jurisdiction is involved, particularly if that jurisdiction uses some other standard. At a minimum it should be permissible to use "more likely than not."

Thank you for the opportunity to comment on this Proposed Interpretation. Please feel free to contact us if further discussion of this comment is desired.

Daryl B. Cramer

G./Research/FASB/Comment Letter - Accounting for Uncertain Tax Positions.doc