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Technical Director
File Reference Number 1215-001
Financial Accounting Standards Board
401 Merritt 7
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Dear Sir or Madam:

U.S. Bancorp appreciates the opportunity to offer comments with respect to the Proposed Interpretation of FASB Statement No. 109 *Accounting for Uncertain Tax Positions.*

General

U.S. Bancorp agrees that consistent application of accounting standards and principles by enterprises is critical to improving financial reporting and facilitating the functioning of markets for capital and credit and the efficient allocation of resources in the economy. The application of tax law is complex and in many situations involves parties with differing objectives interpreting laws, rulings, technical advices and other information. Reasonable, intelligent people can have different views and reach different conclusions given the same facts and circumstances. In defining how the effects of a tax position should be accounted for, the Board should recognize that judgment is still required in applying the proposed Interpretation as under the existing accounting guidance. Will the consistency that the Board is seeking really be achieved by adding the complex rules outlined in the proposed Interpretation?

We generally agree with the position of the dissenting Board members outlined in paragraph B46. Assuming that an Interpretation is necessary, we believe the proposed high standard for recognition of **any** benefits would not result in the most accurate financial presentation. We agree with those commentators that suggest that the application of the proposed Interpretation would result in an overstatement of tax liabilities on the balance sheet and a concurrent understatement of the appropriate tax benefits being recognized in the income statement. If an Interpretation is required, we would suggest a single *"more-likely-than-not"* standard for recognition and de-recognition.

We generally view income tax accounting to be related to the calculation of a liability to a third party rather than evaluating the realization of an asset. Accordingly, we believe that to the extent an estimation process is required to determine the amount of a liability, the process should be focused on determining management's best estimate of that liability. The process should not be impeded by benchmarks or minimum thresholds that would alter the accuracy of management's best assessment of a tax related item.

We address these and other matters in our responses below to the specific issues summarized by the Board in its invitation to comment on the exposure draft.

Scope – Issue 1:

This proposed Interpretation would broadly apply to all tax positions accounted for in accordance with Statement 109, including tax positions that pertain to assets and liabilities acquired in business combinations. It would apply to tax positions taken in tax returns previously filed as well as positions anticipated to be taken in future tax returns. Do you agree with the scope of the proposed Interpretation? If not, why not?

We agree that the Interpretation should apply consistently to all positions and periods.

Initial Recognition – Issues 2 and 3:

The Board concluded that the recognition threshold should presume a taxing authority will, during an audit, evaluate a tax position taken or expected to be taken when assessing recognition of an uncertain tax position. (Refer to paragraphs B12–B15 in the basis for conclusions.) Do you agree? If not, why not?

The Board decided on a dual threshold approach that would require one threshold for recognition and another threshold for derecognition. The Board concluded that a tax position must meet a probable (as that term is used in Statement 5) threshold for a benefit to be recognized in the financial statements. (Refer to paragraphs B16–B21 in the basis for conclusions.) Do you agree with the dual threshold approach? Do you agree with the selection of probable as the recognition threshold? If not, what alternative approach or threshold should the Board consider?

We agree that tax positions should be evaluated presuming a taxing authority will audit the position; however, recognition should be based on the overall merits of the position rather than simply the technical merits. As such, we believe some pragmatic provisions could be added to the Interpretation that would acknowledge situations where the technical merits are not readily determinable because of complexity in the interpretation of the tax regulations. For example, for some state nexus issues there may be uncertainty

as to whether nexus has been created. As a result the taxpayer may take a tax position that nexus does not exist; thereby not filing a tax return in that state. Generally, in that situation, the statute of limitations technically never begins or ends. The proposal may require a tax liability to be carried on the taxpayer's books indefinitely. We suggest that the Interpretation allow for recognition of the benefit in situations where significant ambiguity exists in the tax regulations and, in management's judgment, the likelihood of an assessment is remote.

In addition, we believe clarification should be added to the recognition and measurement provision of the Interpretation to allow enterprises to take into consideration the administrative practices of taxing authorities in applying and enforcing tax laws. Because of the complexity and ambiguity that inherently exists in tax laws, it is not uncommon for tax positions involving gray areas to be resolved through negotiated settlements among reasonable parties. Often, these negotiated settlements can occur on an aggregated basis. As a result, there can be situations where resolution of one position may be tied to the resolution of other tax positions. We believe that this reality needs to be considered in the recognition and measurement provisions of the Interpretation and that a pragmatic approach that ultimately relies on management's best estimate of the outcome should be the basis for recording the assets and liabilities related to uncertain tax positions.

As noted in our introductory comments, we disagree with the dual threshold approach to recognition and de-recognition. We believe a single *more-likely-than-not* standard is appropriate and is not at odds with a requirement that the recognition threshold be high enough to indicate that the tax position represents economic benefits an entity is entitled to receive. We believe a *more-likely-than-not* threshold, coupled with a best estimate measurement approach, would generally result in more accurate accounting for tax expense and tax liabilities and assets. This would eliminate the "cliff effect" that we believe would inherently exist under the proposed *probable* threshold which has been defined in paragraph 9 of the Interpretation. Under the proposed *probable* threshold approach, tax liabilities are likely to be overstated in some periods and subsequently reversed in later periods. In effect, our proposed approach would result in a standard of recognition based on the best estimate of the liability rather than focusing on a probability threshold as a means for measuring liabilities related to uncertain tax positions. If the goal is to create principles based accounting standards rather than thresholds or rules, our proposed approach better achieves that objective.

It is obvious that the recognition evaluation is management's responsibility. Paragraph 9 seems to imply that evidence supporting management's position must come from outside the organization. We understand that management's assessment must be documented and auditable. That being said, we are concerned that the ability to recognize a tax benefit may be driven by the ability of management to get outside independent opinions. There are many situations in which a *should level* opinion can not be obtained; not because of a strong negative concern about the position, but rather as a result of very little case law or other guidance surrounding the issue. In addition, it seems that the requirements of Circular 230 and the general regulatory environment have made it more difficult for

taxpayers to receive tax opinions. This is primarily due to recent changes in the risk management practices of tax experts rather than an actual change in the technical merits of a tax position. This effectively raises the bar for initial recognition beyond a "probable" level.

We believe that the proposed higher *probable* threshold as defined in paragraph 9, may in some situations, put an unreasonable burden of proof on the taxpayer to recognize any tax benefit association with a tax position. In particular, we are concerned about an increasing reluctance by tax practitioners to provide *should level* opinions in situations where historically, such opinions have been commonplace. While tax opinions are just one piece of evidence that would be considered in determining whether the *probable* threshold is met, we are concerned with the diversity in interpretation that may occur among preparers, auditors and regulators in this type of situation. Will this be interpreted as a decline in the certainty of these types of tax positions and not allow recognition of tax benefits previously recognized and considered to be valid?

This standard could have negative implications to the viability of certain business strategies that have positive social and economic impacts within the broader marketplace (such as investments that promote Affordable Housing and investments in designated geographic New Markets). These strategies may no longer be viable to pursue because of the inability to overcome perceived uncertainty created by the inability to obtain *should level* tax opinions despite no substantive change in the nature of the tax positions taken. We believe this is just one example of the undue complexity and potential difficulties in applying the high threshold *probable* standard as defined in the Interpretation. A *more-likely-than-not* threshold, coupled with a best estimate measurement approach would better serve all constituents.

Finally, with respect to initial and subsequent recognition, we suggest that a reasonable best estimate approach be used in connection with the evaluation of whether an issue is *sustained on audit*. As noted above, there are a variety of circumstances when an issue could technically be challenged, based on the statute of limitations being open, after one or more audits have occurred. The evaluation of an uncertain tax position must be based on a pragmatic evaluation of the likely outcome.

Subsequent Recognition – Issue 4

The Board concluded that a tax position that did not previously meet the probable recognition threshold should be recognized in any later period in which the enterprise subsequently concludes that the probable recognition threshold has been met. (Refer to paragraph B22 in the basis for conclusions.) Do you agree? If not, why not?

Subject to the *more-likely-than-not* level of recognition, we agree.

De-Recognition – Issue 5

The Board concluded that a previously recognized tax position that no longer meets the probable recognition threshold should be derecognized by recording an income tax liability or reducing a deferred tax asset in the period in which the enterprise concludes that it is more likely than not that the position will not be sustained on audit. A valuation allowance as described in Statement 109 or a valuation account as described in FASB Concepts Statement No. 6, Elements of Financial Statements, should not be used as a substitute for derecognition of the benefit of a tax position. (Refer to paragraphs B23–B25 in the basis for conclusions.) Do you agree with the Board's conclusions on derecognition of previously recognized tax positions? If not, why not?

We agree that valuation accounts should not be used for de-recognition. We also agree that tax benefits should be de-recognized when it is no longer *more-likely-than-not* that the benefits will be received.

Measurement - Issue 6

The Board concluded that once the probable recognition threshold is met, the best estimate of the amount that would be sustained on audit should be recognized. The Board concluded that any subsequent changes in that recognized amount should be made using a best estimate methodology and recognized in the period of the change. (Refer to paragraphs B9–B11 and B26–B29 in the basis for conclusions.) Do you agree with the Board's conclusions on measurement? If not, why not?

Subject to the *more-likely-than-not* level of recognition, we agree.

Classification – Issue 7

The Board concluded that the liability arising from the difference between the tax position and the amount recognized and measured pursuant to this proposed Interpretation should be classified as a current liability for amounts that are anticipated to be paid within one year or the operating cycle, if longer. Unless that liability arises from a taxable temporary difference as defined in Statement 109, it should not be

classified as a deferred tax liability. (Refer to paragraphs B30–B35 in the basis for conclusions.) Do you agree with the Board's conclusions on classification? If not, why not

We agree with the Interpretation.

Change in Judgment – Issue 8

The Board concluded that, consistent with the guidance in paragraph 194 of Statement 109, a change in the recognition, derecognition, or measurement of a tax position should be recognized entirely in the interim period in which the change in judgment occurs. (Refer to paragraph B36 in the basis for conclusions.) Do you agree with the Board's conclusions about a change in judgment? If not, why not?

We agree with the Interpretation.

Interest and Penalties – Issue 9

The Board concluded that if the relevant tax law requires payment of interest on underpayment of income taxes, accrual of interest should be based on the difference between the tax benefit recognized in the financial statements and the tax position in the period the interest is deemed to have been incurred. Similarly, if a statutory penalty would apply to a particular tax position, a liability for that penalty should be recognized in the period the penalty is deemed to have been incurred. Because classification of interest and penalties in the income statement was not considered when Statement 109 was issued, the Board concluded it would not consider that issue in this proposed Interpretation. (Refer to paragraphs B37–B39 in the basis for conclusions.) Do you agree with the Board's conclusions about recognition, measurement, and classification of interest and penalties? If not, why not?

We agree with the Interpretation.

Disclosures – Issue 10

The Board concluded that loss contingencies relating to previously recognized tax positions should be disclosed in accordance with the provisions of paragraphs 9–11 of Statement 5. The Board also concluded that liabilities recognized in the financial statements pursuant to this proposed Interpretation for tax positions that do not meet the probable recognition threshold are similar to contingent gains. Therefore, those liabilities should be disclosed in accordance with the provisions of paragraph 17 of Statement 5. (Refer to paragraph B40 in the basis for conclusions.) Do you agree with the disclosure requirements? If not, why not?

We agree with the Interpretation.

Effective Date and Transition - Issue 11

The Board concluded that this proposed Interpretation should be effective as of the end of the first fiscal year ending after December 15, 2005. Only tax positions that meet the probable recognition threshold at that date may be recognized. The cumulative effect of initially applying this proposed Interpretation would be recognized as a change in accounting principle as of the end of the period in which this proposed Interpretation is adopted. Restatement of previously issued interim or annual financial statements and pro forma disclosures for prior periods is not permitted. Earlier application is encouraged. (Refer to paragraphs B41–B43 in the basis for conclusions.) Do you agree with the Board's conclusions on effective date? If not, how much time would you anticipate will be necessary to apply the provisions of this proposed Interpretation? Do you agree with the Board's conclusions on transition? If not, why not?

It is our assessment that this Interpretation will require a considerable amount of analysis. It would be very difficult to complete our analysis with the appropriate internal and external reviews before the end of 2005. As a result, implementing this Interpretation may significantly delay earnings releases and SEC filings for many companies. This could have significant adverse market implications. Accordingly, we would recommend the effective date by delayed until no earlier than fiscal years beginning after December 15, 2005; assuming the Interpretation is finalized and issued prior to the end of 2005.

Thank you for your consideration of our comments on these very important issues. Please contact me at 612-303-4352 with any questions, comments or if you would like any further information.

Sincerely,

/s/ Terrance R. Dolan

Terrance R. Dolan
Executive Vice President and Controller