



**Software Finance & Tax Executives Council**  
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January 8, 2007

Mr. Robert H. Herz  
Chairman, Financial Accounting Standards Board  
401 Merritt 7  
P.O. Box 5116  
Norwalk, CT 06856-5116



LETTER OF COMMENT NO. 21

**Re: Delay in Implementation of FIN 48**

Dear Chairman Herz:

On behalf of the Software Finance and Tax Executives Council (SoFTEC), I write to add the voice of the software industry to those requesting a delay in the implementation of FIN 48, Accounting for Uncertainty in Income Taxes. We believe that implementation of this accounting guidance presents unique compliance issues for software companies justifying an extension of its effective date.

SoFTEC is a trade group providing software industry focused public policy advocacy in the areas of tax, finance and accounting. Because your proposed guidance embodied in FIN 48 touches on all three areas of our expertise it naturally is of interest to our member companies. Hence, we add our comments to your efforts.

One of the biggest challenges in the adoption is the inconsistent application of FIN 48 by the audit firms. FIN 48 is designed to bring consistency to the process of contingency accruals, but there does not seem to be any consensus among the audit firms on how to apply it. Business needs a uniform understanding of the pronouncement before public companies can uniformly apply it.

As you know, software industry business models present unique challenges in terms of financial reporting principally in the area of software maintenance revenue. Corporate executives exercise considerable judgment on a daily basis in unbundling software transactions even before any consideration is given to the tax treatment of the transaction. Software companies also struggle daily with the task of determining the proper revenue recognition for software maintenance. Determining the proper revenue recognition requires the application of amorphous concepts such as "vendor specific objective evidence" and "class of customer." Software companies experience similar difficulties in determining the proper taxation of such revenue. Tax guidance in the area is sparse. Some companies choose to apply the general guidance of Rev. Proc. 2004-34 in determining how much revenue to defer from such transactions and for how long. Other companies choose to defer revenue using the guidance in Treas. Reg. 1.451-5 which may provide a different result.

Regardless of which method a software company chooses to determine how to defer revenue from advance payments received in connection with a software maintenance agreement, they are required to exercise considerable judgment. Implementation of FIN 48 would require that a software company review each of its maintenance contracts and evaluate whether the revenue deferral shown on the tax return is more likely than not to hold up on an audit.

Another example of a tax issue that presents unique tax challenges for software companies has to do with cost sharing agreements with foreign affiliates. Many software companies use such agreements to share with their foreign affiliates the cost of developing new technologies with the domestic parent and foreign affiliate co-owning the rights to exploit such technologies. Currently, there is litigation with the Internal Revenue Service over whether companies are required to include in the pool of costs to be shared the cost of employee stock options. One case is in the briefing stage at the Court of Appeals and how that case gets decided will greatly impact a company's evaluation of whether its cost sharing agreement is "more likely than not" to hold up.

Additionally, most software companies have numerous subsidiaries operating in various states and foreign tax jurisdictions; each with differing and ever changing tax rules. This adds complexities on top of the judgment required in setting transfer pricing and cost sharing. Changes in tax law occurring after a transaction was reported could make a previously common tax reporting position suddenly risky; companies are loath to provide tax auditors with a roadmap to where their reporting positions might be challenged. Disclosure levels need to balance shareholder sophistication with a business need to protect the tax return from state, federal and foreign tax administrators. Additional time to implement FIN 48 will give the business community an opportunity to strike that balance.

These are just a few examples of the tax issues peculiar to software companies that present unique challenges in complying with FIN 48. More time is needed for companies to conduct the required evaluations of numerous day-to-day transactions.

We have seen press reports of commentators speculating that the business community seeks a delay because companies may have taken aggressive tax positions they do not want to have to disclose. You should reject this speculation for what it is. The software industry, and other industries, all have unique circumstances making compliance with FIN 48 burdensome. The Board should delay its effective date.

Thank you for considering our request. If you have any questions, please feel free to contact me at (202) 331-9533 or [mnebergall@softwarefinance.org](mailto:mnebergall@softwarefinance.org).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mark E. Nebergall". The signature is fluid and cursive, with the first name "Mark" being the most prominent.

Mark E. Nebergall  
President  
Software Finance and Tax Executives Council

CC: FASB Board Members