The Goldman Sachs Group, Inc. | 180 Maiden Lane | New York, New York 10038 Tel: 212-357-8437 | Fax: 212-346-2996 | email: matthew.schroeder@gs.com

Matthew L. Schroeder Managing Director Accounting Policy



LETTER OF COMMENT NO. //



December 19, 2006

Mr. Lawrence Smith
Director, TA&I -- FSP
Financial Accounting Standards Board
401 Merritt 7
P.O. Box 5116
Norwalk, CT 06856-5116

Re: Proposed FASB Staff Position No. EITF 03-6-a "Determining Whether Instruments Granted in Share-Based Payment Transactions Are Participating Securities"

Dear Mr. Smith:

Goldman Sachs appreciates the opportunity to comment on Proposed FASB Staff Position No. EITF 03-6-a, "Determining Whether Instruments Granted in Share-Based Payment Transactions Are Participating Securities" (the Proposal). We believe that the staff should not issue a final FSP for the reasons outlined below.

<u>Issues raised by the Proposal should be incorporated in the overall discussion of SFAS No. 128</u> to avoid confusion and inefficiency that will result from repeated changes to the methodology for calculating earnings per share:

We note that the FASB Board is planning to issue an exposure draft on Earnings per Share in the first quarter of 2007. We believe that the Board should consider incorporating the issues addressed by the Proposal into the overall reevaluation of the application of SFAS No. 128, Earnings per Share. This will ensure that the resolution of these issues is consistent with the overall framework to be outlined in a revised SFAS No. 128 and will prevent the inevitable confusion for financial statement users that would result from repeated changes to the methodology used to calculate earnings per share (that is, implementing changes to the calculation now and again upon adoption of a revised SFAS No. 128.)

In addition, it is often the case that share-based payment award information is stored in numerous different databases (in the accounting, human resources and legal departments, depending on the need). For many organizations implementation of the Proposal will involve a significant amount of effort and investment of time, including modifications to systems, to ensure that the data is being properly tracked and calculated on the newly prescribed basis. The imposition of such changes now and again with the adoption of a revised SFAS No. 128 will potentially cause repetitive costs and strains on firm resources.

The proposed implementation comes at a time when firms are already expending significant efforts to implement other newly issued standards:

The additional burden that this Proposal will place on firms is coming at a time when firms are already investing significant efforts in implementing numerous new accounting pronouncements. SFAS No. 157, Fair Value Measurements, SFAS No. 158, Employers Accounting for Defined Benefit Pension and Other Postretirement Plans and FIN 48, Accounting for Uncertain Income Taxes – an interpretation of FASB Statement No. 109 are all recently issued standards that require a significant amount of time and effort to effect their proper implementation. In addition to this, we anticipate the issuance of the standard, The Fair Value Option for Financial Assets and Financial Liabilities, in the first quarter of 2007. We believe that adding in a recalculation to EPS concurrent with the adoption of these standards places an undue burden on firms without appropriate benefit to the financial statement users.

<u>Deducting dividends paid on nonvested RSUs from net earnings available to common shareholders results in a double charge to the common shareholders for the same cost:</u>

SFAS No. 123-R paragraph 37 states, "dividends or dividend equivalents paid to employees on the portion of an award of equity shares or other equity instruments that vests shall be charged to retained earnings." The basis for this conclusion is summarized in paragraph B93: "The fair value of a share of stock in concept equals the present value of the expected future cash flows to the stockholder, which includes dividends. Therefore, additional compensation does not arise from dividends on nonvested shares that eventually vest. Because the measure of compensation cost for those shares is their fair value at the grant date, recognizing dividends on nonvested shares as additional compensation would effectively double count those dividends." (emphasis added)

Therefore, deducting dividends paid to holders of nonvested RSUs from earnings available to common shareholders represents a double count of those dividends since the cost to the common shareholders was already reflected as compensation expense. Interestingly, in the FASB Emerging Issues Task Force Issue Summary No. 1 for EITF Issue No. 06-11, "Accounting for Income Tax Benefits of Dividends on Share-Based Payment Awards" opponents of View A (which states that tax benefits received on dividends should be recognized in the income statement) employ this precise logic: "...opponents of View A believe that recognizing the tax benefits from such dividends through the income statement would effectively double count the tax benefit from those dividends if the award ordinarily would result in a future tax deduction under existing tax law, because the deferred tax asset that arises as compensation cost is recognized over the service period is already recognized in the income statement as a reduction of income tax expense." It is our understanding that the opponents of View A prevailed; consequently, it would be inconsistent to require the double count of such dividend charges for purposes of EPS computations.

The treasury stock method appropriately accounts for the economic effects of nonvested share-based awards:

We support the well established practice of including vested securities in the Basic EPS computation and including nonvested securities in diluted EPS computations only through application of the Treasury Stock method described in SFAS No. 128 paragraph 21. We believe this practice was reaffirmed by SFAS No. 123-R, *Share-Based Payment*, paragraphs 66 and 67 which specifically refer to paragraphs 21-23 of SFAS No. 128 for guidance on applying the treasury stock method to employee equity share options, nonvested shares and similar equity instruments. We also believe that this method best mirrors the economic reality. The treasury stock method results in increasing dilution over time as the employee renders service and approaches fully vested status.

We appreciate the opportunity to comment on this complex and important issue. If you have any questions or comments regarding our letter, please do not hesitate to contact me at 212-357-8437, Bob Uhl at 212-357-5531 or Israel Snow at 212-357-5730.

Sincerely,

/s/ Matt Schroeder Matthew L. Schroeder