



LETTER OF COMMENT NO. 23

Committee on Private Companies

January 18, 2008

Mr. Russell G. Golden
Director of Technical Application and Implementation Activities
Financial Accounting Standards Board
401 Merritt 7
P.O. Box 5116
Norwalk, CT 06856-5116

File Reference: Proposed FSP FIN 48-b

Dear Mr. Golden:

The Committee on Private Companies ("CPC") Standards Subcommittee of Financial Executives International ("FEI") wishes to express its support for Proposed FSP FIN 48-b, "Effective Date of FASB Interpretation No. 48 for Nonpublic Enterprises."

FEI is the leading advocate for the views of corporate financial management in the United States. It is a professional association of more than 15,000 CFOs, treasurers, controllers and other senior financial managers. With approximately 7,500 members from private companies, FEI has a strong base of knowledge to draw upon with regard to the financial reporting needs and requirements of the private sector. The CPC is a technical committee of FEI, which formulates private company positions for FEI in line with the views of the membership. This letter represents the views of the Committee on Private Companies Standards Subcommittee and not necessarily the views of FEI.

FEI CPC appreciates FASB's responsiveness in proposing this delay of FIN 48, "Accounting for Uncertainty in Income Taxes," for private companies, following the request for such delay made in our comment letter dated Nov. 6, 2007, which in turn supported the Sept. 4, 2007 comment letter filed by the joint FASB-AICPA Private Company Financial Reporting Committee (PCFRC).

We wish to note four concerns with proposed FSP FIN 48-b, issued on December 19, 2007, which have been amplified following issuance of a related press release issued by FASB on January 8, 2008. These four points, detailed further below, are:

1. Do not deny deferral to companies that relied in good faith on promises of deferral.
2. FEI CPC Recommendation on Definition of 'Adopted' For Purposes of FIN 48 Delay.
3. Do not deem private companies that failed to 'adopt' or provide information re: FIN 48 at interim as having committed an 'error' or not being in conformity with GAAP.
4. For private companies, that are deemed 'pass through' organizations for IRS purposes, the standard significantly raises cost and complexity of reporting with no material benefit.

Do Not Deny Deferral to Companies That Relied in Good Faith on Promises of Deferral

First and foremost, we strongly believe any decision by FASB at this point in time that would deny a deferral to private companies that had not deemed themselves to have already 'adopted' FIN 48, but would be swept into the 'adoption' camp due to wording in the proposed FSP and/or press release about having provided 'information' to third parties at interim periods, would effectively harm private companies by rushing them into adoption of a standard they had understood to be deferred for them. As a practical matter, we would be concerned about the quality of any such rushed adoption, from the standpoint of preparers and auditors physical and conceptual bandwidth during busy season/year-end.

As a practical matter, many if not most of the private company community believed in good faith that they had a reliable basis to put 'pencils down' on implementation of FIN 48 following FASB's November meeting, at which FASB agreed to propose a deferral of FIN 48 for private companies. They had even more basis to allocate their year-end reporting focus on items other than FIN 48 once FASB released the proposed FSP on December 19.

The notion of when standards have been 'adopted' by private companies, particularly during interim (including quarterly) periods, as opposed to year-end, is not as black and white as it is for public companies, which are required to file financial statements quarterly with the SEC (in the form of 10-Qs) and are required to disclose when they have 'adopted' new standards, and certain information about the estimated impact of standards issued but not yet adopted.

The line is more gray for private companies who do not necessarily formally 'issue' a set of financial statements, and the content of those internally prepared financial statements provided, e.g. to lenders at interim varies, as opposed to a complete set of financial statements (including all footnotes, subject to audit) that may be provided at year-end.

In fact, some lenders that require companies to provide financial information at interim periods, in accordance with U.S. GAAP, expressly permit the borrower to exclude normal year-end adjustments – which many private companies view tax related accruals as – and allow the companies to leave out footnotes for purposes of interim reporting. Thus, private companies that provide GAAP based financial information to their lenders may not have previously deemed themselves as necessarily having 'adopted' a new standard, particularly an income tax related standard like FIN 48, prior to year-end, particularly when their only interim reporting has been internally prepared (unaudited) financial statements, which do not include a full set of financial statements or do not include footnotes.

As noted in previous discussions between PCFRC and FASB about subsequent event reporting, even the 'issuance' date of financial statements is sometimes not clear; nor is it necessarily clear that the company has provided GAAP-based financial information vs. financial statements.

Additionally, there appears to have been a presumption by FASB in some prior board discussions on various topics as to whether private companies need a delayed effective date for a new standard, that private companies essentially have a full year to comply with a new standard because they are not required to publish interim financials whereas public companies are required to publish interim statements (10-Qs).

The existence of this gray area and the desire not to add unnecessary complexity to private companies which, we believe, had a reasonable basis to rely on this delay, prompts us to add the 'reasonable judgment' clause in the third part of our suggested 3 point test for the definition of 'adoption' below.

Furthermore, we believe companies should feel free to provide information about standards to be adopted without running the risk of losing out on a potential deferral of the effective date of that standard. To deny a deferral to companies that tried to be transparent and provide useful

information in advance of full adoption of a new standard that was expected to be adopted at year end (in particular, a tax standard which typically involves significant emphasis on year-end review of tax position) would provide a chilling effect on good faith efforts by companies to be transparent.

FEI CPC Recommendation on Definition of 'Adopted' For Purposes of FIN 48 Delay

The second point we wish to make is to provide a proposed definition for the term 'adopted' for purposes of FASB's proposed FIN 48 delay for private companies.

To some observers, particularly some auditors, FASB's Jan. 8 press release has been described as an attempt by FASB to 'interpret' or 'clarify' a key point in the proposed FSP. It is our understanding that any inconsistency in wording of FASB's press release vs. the proposed FSP was unintentional. However, the inconsistent wording has further flamed divergent views on one core issue in the proposed FSP: the definition of when a standard has been 'adopted.'

The importance of defining when a standard has been 'adopted' plays a critical role in determining whether entities can avail themselves of a proposed delay in a standard that has not already been 'adopted' by that entity.

To address this concern, FEI CPC recommends FASB scope the wording in the final FSP to 'adoption' of the standard (and not broaden it to provision of 'other financial information' or any other term than 'adoption' or 'adopted') and that FASB define 'adoption' by the following three point test, for purposes of this FSP only, as follows:

1. an entity that has **not** provided any **recognition, measurement or disclosure** of the FIN 48 provisions in its 2007 interim release of financial information will be presumed to have **not** adopted FIN 48 in 2007, and can therefore defer adoption to 2008.
2. an entity that **has** provided any of the above information in its 2007 interim release of financial information will not be presumed to have adopted FIN 48 in 2007, unless that entity has specifically stated in that interim report that it has 'adopted' FIN 48.
3. both of the above presumptions are rebuttable based on individual facts and circumstances as to whether the company intended to formally 'adopt' FIN 48 in interim financial information released to third parties, as opposed to 'adopting' it at year-end.

We recommend the above three point test for whether FIN 48 was 'adopted' in order to determine eligibility for the deferral of FIN 48 be applied **solely** for purposes of this FSP, and not necessarily analogized to other circumstances. That is because the many thousands of private company issuers need a quick resolution of this issue because most are in the midst of year-end reporting season, and need a reasonable basis – allowing for reasonable judgment as to substance vs. form - for determining if they do or do not qualify for the deferral.

Without the language above, we believe many if not most private companies would be ineligible for any deferral of FIN 48. This would negate the rationale for the delay in the first place, which was to address issues raised about private company application of FIN 48, including the usefulness of certain requirements, confusion about implications for pass-through entities, and a general lack of preparation and education of a large swath of the private company community on this issue due to timing of issuance of the final standard (FIN 48). This was noted by the PCFRC in September, and the fact that accounting for income taxes is heavily determined at year-end.

Over the long run and in more general circumstances, if FASB believes there is a need to define 'adopted' more generally, then we suggest FASB issue a proposed FSP on the definition of 'adopted' following issuance of the final FSP on FIN 48, which would be subject to adequate due

process and comments, and be applicable to future situations, but not the present situation of the FIN 48 delay.

The reason for limiting the scope of the proposed definition of 'adoption' just to this FSP, is because a timely answer is required as soon as possible for private companies.

Do Not Deem Private Companies That Failed to 'adopt' or Provide Info Re: FIN 48 at Interim as Having Committed an 'error' or Not Being in Conformity with GAAP

The third point we wish to make is that we absolutely believe companies should in no instance be 'deemed' to have adopted FIN 48 solely because they issued some type of GAAP based interim financial information to third parties (even if it did not expressly mention FIN 48), and more importantly, neither should companies who were silent on FIN 48 or assert they did not adopt FIN 48 in their interim financials be deemed to be in violation of GAAP or to have committed an 'error.'

Many of our members have heard anecdotally that such an 'error' or 'failure to conform with GAAP' interpretation is being floated by at least one accounting firm. The specifics of this tax-based standard (FIN 48) lend itself to year-end workups by companies and their auditors. Whether FASB chooses to remain silent on this particular point or not is up to FASB, however, if FASB wants to make a statement in this regard, we strongly urge you to state FIN 48 cannot automatically be deemed to have been adopted, or subject to a 'should have been adopted' standard, simply because an entity released some interim financial information to third parties.

For Private Companies, That are Deemed 'pass through' Organizations for IRS purposes, the Standard Significantly Raises Cost and Complexity of Reporting with No Material Benefit.

The fourth point we wish to make is one of value to the private company 'pass through' financial statement user. We do not understand how the benefits of this standard for such a reader are even closely balanced by the costs of its implementation. We wish to make the following observations:

- 1) The vast majority of private organizations are 'pass through' organizations for IRS tax purposes – either 'sub chapter S' or LLC;
- 2) As such, the vast majority of the income tax obligation on the organization's income is actually paid by the owner;
- 3) To be able to pay the income tax, most private organizations remit a 'dividend' or 'profit remittance' to the owner;
- 4) GAAP does not classify these remittances as other than a dividend;
- 5) Some of the larger private organizations, have subsidiary operations that operate in foreign jurisdictions, via a branch of a US 'S' or are 'check the box' or 'per se' corporations that would require complex income tax calculations and disclosures. Further, there are taxes withheld on royalty and other cash remittances, useful for either the corporation or the owner, that would impact such calculations generating further complexity;
- 6) Further, a number of these organizations operate in multiple state and local income taxing jurisdictions. Some of these jurisdictions provide alternatives on filing taxes at the organizational level or at the individual level. The choice would impact the calculations and disclosures but not the ultimate cash flow to the organization;
- 7) Given the complexity and cost required to do, disclose and audit these calculations, and given the fact that the majority of the actual tax on 'pass through' organizational income is paid by the individual, we must question the overall benefit of this standard vs. the cost to implement it. Therefore, during the proposed delay period, we would suggest that additional consideration be given to the costs and complexities required to implement this standard for private 'pass through' organizations, and whether there should be a permanent delay for these organizations given the cost / benefit ratio.

Once again, FEI CPC thanks the FASB and believes that if we all aim to provide meaningful financial reporting at a reasonable cost, without imposing undue liability on companies that acted in good faith and made reasonable assumptions as to the status of FASB's proposed deferral for private companies (consistent with most press reports through the end of 2007), that all stakeholders – users of financial reporting, preparers, auditors and standard-setters, can benefit.

Thank you for considering our comments supporting FASB's proposed delay of FIN 48 for private companies. If you have any questions or wish to discuss this issue please feel free to contact me at 412/257-3885 or at Bill.Koch@ddiworld.com or Serena Dávila at FEI's Washington, D.C. office at 202/626-7809 or sdavila@financialexecutives.org.

Sincerely,

A handwritten signature in black ink, appearing to read "William Koch". The signature is fluid and cursive, with the first name "William" being more prominent than the last name "Koch".

William Koch
Chair, Standards Subcommittee
Committee on Private Companies
Financial Executives International