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Technical Director
Financial Accounting Standards Board
401 Merritt 7
PO Box 5116
Norwalk, CT 06856-5116

RE: **File Reference 1215-001-Proposed Interpretation for Accounting for Uncertain Tax Positions**

Dear Director:

M&T Bank appreciates the opportunity to respond to the proposed interpretation of FAS 109. We support the goal of increased comparability in financial reporting of income taxes, but believe that the proposed changes suggested in this Interpretation will not result in reliability or comparability of financial statements. The proposals as written, would actually cause a general overstatement of tax liability related to uncertain tax positions. We believe that a better approach to measuring expense related to an uncertain tax position is outlined by two of your Board members, in paragraphs B46 and B47. Recording a liability for management's best estimate of anticipated payments of tax and interest to taxing authorities provides more faithful accounting for a company's tax expense and liabilities.

Issue 1- We disagree with the overall approach of the proposed interpretation. However, if the Board implements the proposal as written, we believe that the proposed accounting for uncertain tax positions should only apply to positions taken in periods beginning after the effective date. Previous transactions have already been recorded in accordance with generally accepted accounting principles. Any attempt to re-evaluate tax positions that may be many years old will not add to the clarity of financial reporting.

Issue 2- We would agree that the assessment of recognition of an uncertain tax position should presume that an auditor will examine that uncertain tax position. Detection risk is not a measurable component of the evaluation of an uncertain tax position.

However, attempting to apply the presumption of examination concept to state taxes where no return has been filed will result in a needlessly complicated exercise that will add little to refining the tax liability of a company. A company is required to file tax returns in states where it is doing business. Most state laws apply subjective tests as to

when a company is doing business and is required to file a tax return. Many activities that a company may engage in do not rise to the level of creating a requirement to file a return in a given state. In most cases the threshold level of activity that creates a tax liability is vaguely defined under state law. In general, where the level of activity is de minimus and unclear as to creating a filing requirement, companies often choose not to file tax returns in those states. It would be very difficult to meet the "probable" threshold to recognize the benefit of non-filing based on lack of guidance in state laws. Since statutes of limitations never expire where a return is not filed, this assortment of ever increasing potential liabilities for each non-filing state would never be eliminated. If a particular state taxing authority never challenges the taxpayer, reserves would be held indefinitely.

We believe the Board, if the ED is implemented as written, should make it clear that this indefinite holding of reserves is not the intended result.

Issues 3 through 6- It is our opinion, if the exposure draft is implemented as written, that the result will be a material overstatement of tax liabilities associated with uncertain tax positions. In addition, there will be systematic reversals of these overstated tax liabilities to income related to the release of excess tax liability timed to the settlement of audits or expiration of the statute of limitations. Volatility in financial reporting will be increased because the period of deduction for the tax expense related to uncertain tax positions will no longer match the period the related income is earned.

We believe that a method of accounting for uncertain tax positions that recognizes a liability to measure the uncertainty about the sustainability of the position is a more appropriate method of accounting than the Board's proposed asset recognition concept. Most uncertainty in tax comes from a lack of clarity in tax laws and guidance used to assess the taxpayer's tax liability. Since no taxpayer sets out to pay more tax than necessary, vague tax laws are generally interpreted in a favorable manner on a filed return. Any adjustments imposed by a taxing authority result in additional liability, not a reduction in a created tax asset.

Many issues in taxation are not black and white. Gray is often the prevailing color found upon analysis of tax issues associated with a transaction. In our experience, very little of the uncertainty in tax positions is related to abusive tax shelters or dubious tax avoidance strategies. Most of the uncertainty comes from unclear or undeveloped law at the federal, state and local level. In particular, it is often difficult to determine what, if any economic activity should be allocated to state and local jurisdictions. We would expect that for many tax issues that it would be difficult to reach a probable standard even after a thorough analysis. We would not knowingly claim deductions or take tax positions that would result in a penalty if a tax authority required an adjustment. Therefore, for both tax return filing and for financial reporting purposes we would prudently require a "more likely than not" level of comfort before recognizing the reduction in tax liability associated with a particular transaction. At this level of comfort, though, on some issues we may expect to ultimately concede 40 to 50 percent to the taxing authority to settle the issues. This expectation could be based on our Company's own audit history or the

experience of taxpayers with similar issues. Expectations of compromise and settlement with the taxing authority cannot be ignored when establishing tax reserves for uncertain transactions. In many cases both the taxpayer and the taxing authority have clear expectations of compromise where both parties agree that tax law or factual matters are gray. In practical terms, the settlement of uncertain tax positions takes on the form of negotiation, compromise and settlement where very often offset or aggregation with other positions occurs.

We believe that if the Board's proposals were adopted we would be accruing far more tax liability than we would ever expect to pay in many circumstances where a "probable" standard could not be met. The Board could greatly increase uniformity in accounting for uncertain tax positions by simply issuing an interpretation clarifying that undiscounted expected value measurement of tax liabilities associated with uncertain tax positions must be utilized where there is the possibility for challenge by a taxing authority.

The concept of derecognition (Issue 5) raises difficult issues of judgment. What happens to a tax position that was determined to meet the probable recognition standard when initiated, but is now subject to challenge by a taxing authority? Does the challenge of the position mean that the benefit is now more likely than not to not be realized? Where audits often last through numerous reporting periods, should a company fully derecognize a tax position where an issue is raised but compromise is expected in one period, only to recognize the benefit of the compromise in a later period? If the Board adopts the Interpretation as written, then clarification of the recognition and derecognition standards is necessary.

To outline our concerns we wish to pose an example.

A company that is in the leasing business enters into a lease transaction in 1998. As is the case with most leases, tax benefits are derived early in the transaction only to be "paid back" later in the lease term and at the end of the lease. This flow of tax benefits is properly recorded as a deferred tax liability. A "should" level tax opinion indicated that the benefits are probable.

The IRS classifies this transaction as a "Listed Transaction" in 2002. Management continued to believe that the position was sustainable in Tax Court based on discussions with numerous advisors. Because of the uncertainty of litigation, compromise with the IRS was viewed as a possible outcome of examination. Upon examination by the IRS in 2004, a settlement was reached with the IRS to recognize only a portion of the benefit taken in the 1998 to 2002 tax returns, with the remainder of the benefit to be obtained over the remaining term of the lease.

Under the proposed interpretation, the tax benefit would have been recognized for 1998 through 2001, a liability would be booked in 2002 for the entire benefit recorded in the previous years, and in 2004 a tax benefit would have been re-recorded for a substantial portion of the benefit sustained upon audit.

Under current practice, in 2002 management would use its best information to value any audit-based liability needed and record a best estimate of any payments expected upon resolution with the IRS. This estimate would be revised as information was obtained from advisors, and as negotiations with the IRS examiners proceeded. There would be no wild swings in tax liability as would occur under the proposed methods.

We would conclude that the current practice would best measure record report the related tax liabilities.

Issue 11- If the Board adopts the Interpretation maintaining the "probable" standard for recognition, then the effective date of the final rule should be postponed for at least a year in order to give companies and their auditors' time to properly implement this guidance. We would expect that it would be difficult to formalize a level of comfort for all uncertain tax positions to the satisfaction of external auditors in even that amount of time. We believe that any less than this amount of time to transition to the proposed interpretation will cause significant disruption in reporting.

Thank you for the opportunity to comment on this important Financial Accounting Standards Board project.

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