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December 12, 2006

Mr. Robert H. Herz
Chairman, Financial Accounting Standards Board
401 Merritt 7
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LETTER OF COMMENT NO. 2

Re: *Proposal to Delay Effective Date for FIN 48*

Dear Chairman Herz:

Tax Executives Institute strongly urges the Financial Accounting Standards Board to delay the effective date of FIN 48 on *Accounting for Uncertainty in Income Taxes* and its effect on the *Statement on Financial Accounting Standard 109* to allow companies and their independent auditors sufficient time to address the substantive, procedural, and documentation challenges posed by the new interpretation. Specifically, we recommend that the effective date of FIN 48 be extended to fiscal years beginning after December 15, 2007.

Tax Executives Institute is the preeminent association of corporate tax executives in the world. Our more than 6,400 members are accountants, attorneys, and other business professionals employed by approximately 2,800 of the leading companies in the United States, Canada, Europe, and Asia. TEI represents a cross-section of the business community, and is dedicated to the development and implementation of sound tax policy and to promoting the uniform and equitable enforcement of the tax laws. The Institute is proud of its record of working with congressional committees, government agencies, and other policy-making bodies (including the Financial Accounting Standard Board and Public Company Accounting Oversight Board) to minimize the cost and burden of tax administration and compliance to the mutual benefit of the government, business, and ultimately the public. TEI supports efforts to ensure that companies fairly present their financial position in financial statements prepared for investors and in documents filed with the Securities and Exchange Commission.

TEI members are responsible for conducting the tax affairs of their companies, ensuring compliance with the tax laws, and properly reporting the effect of tax positions on their financial statements. Thus, members deal with the tax code in all its complexity, as well as with the Internal Revenue Service and other tax administrators, on a daily basis. Nearly all of the companies represented by our members issue financial statements that are governed by the FASB's pronouncements and most are SEC registrants. In addition, they are subject to scrutiny by the IRS and various other agencies in the United States and foreign jurisdictions on a continual basis.

Background

What is now FIN 48 can be traced to a December 2003 speech at the AICPA Conference on SEC Developments, where an SEC staff member expressed concern about the application of FAS 109 to "tax advantaged transactions," and questioned whether tax assets should be recognized when the benefit may not be realized. In a March 2004 roundtable discussion involving representatives of the Big Four accounting firms, SEC, and FASB staff, the participants discerned significant "diversity in practice" in the recognition of tax benefits associated with aggressive transactions. On this basis, the FASB concluded during its July 27, 2004, meeting that an interpretation of FAS 109 should be developed to address the treatment of uncertain tax positions.¹ An exposure draft of the proposed interpretation was released for comment on July 14, 2005, and a roundtable discussion was held on October 10, 2005. Subsequently, the exposure draft was modified incrementally via re-deliberations at Board meetings from December 2005 through May 2006. FIN 48 was released July 13, 2006, and is effective for fiscal years beginning after December 15, 2006.

Discussion

FIN 48 alters the financial statement treatment of accounting for uncertainty regarding income tax positions by shifting the focus from the contingent liability approach of FAS 5 to an analysis of whether each and every tax position is supported at a more likely than not level of confidence. As a result, financial statement issuers must analyze their entire inventory of tax positions — claimed and unclaimed — in every jurisdiction, for every taxing authority, and for every open tax year in order to understand and document the company's position at the effective date.

When the scope of new guidance is as broad and far reaching as FIN 48, and the potential consequences of inadvertent non-compliance so significant, special care must be taken to accord affected parties sufficient time to analyze the new rules, to obtain advice about open questions, and to develop, adapt, and test systems and processes to ensure compliance. Regrettably, the five-month period between the July 13 release date and December 15 effective date has not been adequate. TEI submits that the orderly implementation of FIN 48 requires that its effective date be postponed and that the new interpretation be effective no earlier than for fiscal years beginning after December 15, 2007.

While TEI and its members support the FASB's objective of bringing greater clarity to the accounting for uncertain income tax positions, we regret that the FASB has misapprehended and

¹ For background materials distributed at the September 2004 Financial Accounting Standards Advisory Council Meeting, see http://www.fasb.org/project/09_2004uncertainntax.pdf.

minimized the challenges that FIN 48 presents to issuers. By moving away from the "as filed" standard of FAS 5, FIN 48 has impelled issuers to revisit nearly every tax position in every open tax year. That burden is tantamount to, and as challenging as, re-filing an income tax return in every jurisdiction for every open tax year. Simply put, there has not been sufficient time between the release of FIN 48 and its stated effective date for companies to complete the necessary analysis and documentation.²

One measure of the analytical and implementation concerns raised by FIN 48 is the "land-office business" that organizations such as TEI have experienced in sponsoring educational programs about FIN 48 and its implications. For example, two programs sponsored by TEI (one in November and the other earlier this week) drew nearly 900 tax executives. TEI was pleased that Mr. Russell Golden of the FASB staff agreed to participate in these programs, especially since he was able to observe first hand the depth and breadth of concern by those professionals charged with ensuring compliance with the new interpretation. Specifically, the seminar participants engaged Mr. Golden, the other speakers, and their fellow participants on a wide range of technical questions and process concerns about implementing FIN 48, as well as the uncertainties regarding review, auditing, and disclosure standards.

Issuers have consistently evaluated various positions taken on tax returns and reached conclusions regarding the propriety of those positions. Issuers are now faced, however, with the daunting task of evaluating whether each position meets the "more likely than not" standard and creating documentation for these conclusions that will be sufficient to satisfy external auditors. In addition, issuers must evaluate a range of potential outcomes to determine the appropriate measurement for each position, which also must be documented. The effort involved with this is enormous, especially for large, multi-entity issuers filing in multiple jurisdictions.

Among the key questions for which substantive and process-based guidance is critical to proper FIN 48 compliance are the following:

1. What does "all" mean for purposes of "all income tax positions"? Is there a concept of materiality for purposes of FIN 48 and, if so, what is it?
2. What constitutes "finality" for purposes of FIN 48? For example, is a closing agreement between the IRS and taxpayers pursuant to section 7121 of the Internal Revenue Code sufficient where the statute of limitations remains open for additional assessments?
3. What is the proper interface between controls mandated by section 404 of Sarbanes-Oxley, FIN 48, and section 6001 of the Internal Revenue Code?
4. What constitutes adequate documentation for purposes of FIN 48?

² We note that the Chief Accountant of the Securities and Exchange Commission said recently [BNA, Daily Tax Report, December 8, 2006] that the issue of complexity in accounting will be addressed by the agency early in the new year and will be a leading topic of work by that office in 2007. We hope that the complexities engendered by FIN 48 will be included in those efforts.

5. What is the proper and adequate form of presentation of the financial statement disclosures required under FIN 48?
6. How are companies to monitor and inventory uncertain tax positions?

TEI submits that without sufficient time to digest the new interpretation, required disclosures may be incomplete (or excessive), inaccurate, and inconsistent and therefore impede rather than advance the objective of providing investors, regulators, and the capital markets appropriate financial statement information about their tax positions.

The range of open and unanswered questions presents significant risk that there will be an even greater divergence in interpretation and approach which will result in an even greater diversity in practice than existed previously. Extending the deadline for implementing FIN 48 will greatly reduce these risks. Accordingly, TEI recommends that the effective date of FIN 48 be deferred for one year.

Conclusion

Tax Executives Institute appreciates the opportunity to comment on the proposed Interpretation and would be pleased to discuss its comments with the Financial Accounting Standards Board. If you should have any questions about the comments, please do not hesitate to me at 920.721.2230 or dbernard@kcc.com or either Eli J. Dicker, the Institute's Chief Tax Counsel or Jeffery P. Rasmussen of the Institute's legal staff at 202.638.5601 or, respectively, edicker@tei.org and jrasmussen@tei.org.

Respectfully submitted,



David L. Bernard
International President