

January 18, 2008

Russell G. Golden, CPA Director of Technical Application and Implementation Activities **FASB** 401 Merritt 7 PO Box 5116



LETTER OF COMMENT NO. 30

Re: December 19, 2007 Proposed FASB Staff Position (FSP) FIN 48-b, Effective Date of FASB Interpretation No. 48 for Nonpublic Enterprises

Dear Mr. Golden:

Norwalk, CT 06856-5116

One of the objectives that the Council of the American Institute of Certified Public Accountants (AICPA) established for the PCPS Executive Committee is to act as an advocate for all local and regional firms and represent those firms' interests on professional issues, primarily through the Technical Issues Committee (TIC). This communication is in accordance with that objective. These comments, however, do not necessarily reflect the positions of the AICPA.

TIC has reviewed the Proposed FSP and is providing the following comments for your consideration.

### **GENERAL COMMENTS**

TIC applauds the Board for listening to TIC and other constituents who have been requesting a deferral of the effective date of FIN 48. TIC is pleased that nonpublic enterprises, including many pass-through entities and not-for-profit organizations, will have more time to implement its provisions. TIC also encourages the Board to issue the final FSP as soon as possible to allow those who are still eligible for the deferral to take advantage of it. The specific comments below also include TIC members' concern regarding the recent controversy over the adoption provisions relating to the FIN 48 deferral.

TIC continues to believe, however, that the scope of the deferral in the Proposed FSP should include all nonissuers, including not-for-profit organizations that meet the definition of public entities (e.g., conduit debt obligors) in paragraph 289 of FASB Statement No. 109, Accounting for Income Taxes.





#### SPECIFIC COMMENTS

## Scope of the Deferral

TIC believes the scope of any deferral proposal should be decided based on the segments of the Board's constituency that demonstrate the greatest need for temporary relief from the provisions of a standard. The need to provide implementation relief to a particular group should always override any potential concerns regarding complexity or consistency with the definitions in other Standards.

TIC reached out to various AICPA-member, not-for-profit experts to determine whether their views concur with TIC's opinion on the issue of a deferral for conduit debt obligors. Although a conduit debt obligor may meet the definition of a public company under FASB Statement No. 109, TIC members and the NPO experts agree that such obligors are no more prepared to implement FIN 48 and would have no more expertise to do so than a nonpublic, for-profit company.

TIC, therefore, recommends that the deferral should be based on whether the entity is an issuer or nonissuer. This terminology would only be applicable for the duration of the deferral and would disappear once FIN 48 was fully effective. Any complexity or inconsistency attributed to having a different scope for the deferral compared to FASB Statement No. 109 would be short-lived and should not cause concern.

## **FASB Implementation Guidance**

TIC also encourages the Board to reconsider its decision not to provide FIN 48 implementation guidance. Paragraph 3 of the Proposed FSP acknowledges that confusion exists regarding the applicability of FIN 48 to not-for-profit organizations and pass-through entities. Consistent guidance cannot be developed by multiple commercial providers without the FASB providing a basic foundation from which to develop such guidance. Therefore, FASB guidance on pass-through entities (at a minimum) is essential to ensure consistent application of this standard on a timely basis.

FASB needs to define what pass-through entities are and state its position on the taxation of pass-through entities. The lack of guidance for pass-through entities has led to a number of specific questions that arise frequently in practice:

• Most states have the legal authority to attach nexus onto the pass-through entity doing business in the state but not the individual shareholder of the pass-through entity. As a result, many states have set up withholding requirements for the passthrough entity for tax to be paid at the individual level. When a pass-through entity





has an uncertain tax position regarding tax to be paid at the individual level, many questions arise about the appropriate accounting treatment.

- O Assuming that the debit for the uncertain tax position should be in equity, is this recorded on the accrual basis? Cash basis?
  - Should the debit be recorded when a distribution is declared?
- o Is the Company's prior history of providing tax distributions relevant?
- o Are provisions in shareholder agreements of pass-through entities which require tax distributions relevant?

Also, even if the questions above are resolved, the question of whether or not a tax is an entity level tax or individual level tax is not always clear. For example, the Commonwealth of Kentucky has an entity-level Limited Liability Entity ("LLE") tax. The owners of the entity subject to the LLE tax receive a nonrefundable credit for LLE tax paid at the individual level. As a result, it is not always clear whether or not this is a tax on the entity or owner. As States continue to engineer different tax regimes, more of these types of questions will arise.

As the Proposed FSP is currently written, many pass-through entities defined as a "public company" will be struggling with these questions. TIC feels these entities deserve more time so that these questions can be resolved.

TIC believes the Board's involvement is essential to alleviate some of the complexities created by FIN 48 especially given the pervasive number of entities that will be affected by the answers.

# Adoption Provisions of the Proposed FSP

TIC has also become aware of interpretations of the "adoption" provisions of the Proposed FSP that are troubling. Specifically, some have indicated that any release of financial information (whether or not this information included FIN 48) to a third party would mean that that company "adopted" FIN 48 and would not be able to take advantage of the deferral in the Proposed FSP. This interpretation does not appear to be supported by a reading of the plain language of paragraph 7 of the Proposed FSP. Many non-issuers present internally generated financial statements to third parties which are not intended to be a presentation of GAAP financial statements. Rather, these statements are more akin to operational reporting that is shared with financial institutions that are much more involved in a non-issuer's operations than a passive equity investor of an issuer.

We feel that the FASB should not attempt to delineate (in formal or informal communications) the types of financial information that would or would not constitute an





"adoption" of FIN 48 when submitted to a third party. Rather, the FASB should only indicate that the question of whether or not a company has adopted FIN 48 should be determined by examination of all of the relevant facts and circumstances.

# **Summary**

TIC believes each of the following suggestions could be adopted by the Board in a timely manner so that issuance of the final FSP occurs no later than early February 2008:

- Change the scope of the deferral to all nonissuers;
- State that the FASB will prepare implementation guidance for pass-through entities during the deferral period; and
- Eliminate confusion surrounding the adoption provisions of the FSP.

TIC appreciates the opportunity to present these comments on behalf of PCPS member firms. We would be pleased to discuss our comments with you at your convenience.

Sincerely,

Stephen Bodine, Chair

Stephen Bodine

PCPS Technical Issues Committee

cc: PCPS Executive and Technical Issues Committee

