Financial Accounting Standards Board
Proposed FAS 141(R)- a Due 1-15-09
Accounting for Assets Acquired and Liabilities Assumed in Business Combinations Arising from Contingencies Director@fasb.org



By: Dr. Joseph S. Maresca CPA, CISA

Colleagues,

The issuance is effective in business combinations; wherein, the acquisition date is on or after the beginning of the first annual report period of 12-15-08. The goal of the FASB is to determine whether or not:

- (a) Financial reporting will improve
- (b) Can the fair value of an asset or liability arising from contingencies be determinable realistically?
- (c) Are the costs of compliance reasonable?
- (d) There is guidance for when the fair value of the assets and liabilities can be reasonably determinable.
- (e) There are concerns about no clear resolution of a contingency. 141R (proposed amendment) calls for derecognition if practical enforcement of the liability is remote (by inference probabilistically)

Critique and Complicating Factors:

There is a distinction between contractual and non-contractual contingencies. The Sixth Circuit Court of Appeals interpreted duties imposed on banks that market derivative products. The Circuit uniformly rejected a duty of appropriateness. In essence, the Sixth Circuit inferred the following. "Let the corporate buyer beware"!

The opinion reinforced a basic tenet of the over-the-counter-derivatives markets; namely, that swaps are in the nature of "principal to principal" transactions. Therefore, end users are responsible for engaging their own experts/independent advisors to assist in the evaluation of proposed transactions. The end user should not place too much reliance on the advice of counterparties unless there is an "air tight" agreement spelling out the rights, duties and liabilities in non-ambiguous terms.

The issue involved the opinion in Power and Tel. Supply Co. v. Sun Trust Banks, Inc. I.S. App. LEXIS 12087 2006 FED APP 166P (6th Circuit - Tennessee 2006)

Specifically, accountants and lawyers must sort through the myriad of derivative transactions which accompany a business combination. In addition, General Motors has derivative transactions cited on its financial statements. So, the issue crosses industrial lines. Transactions which complicate the preparation and consolidation of financial statements include:

- o interest swaps
- o currency swaps
- o equity options
- o credit default swaps
- o structured mortgage pool transactions
- o market value swaps
- o bundled debt into synthetic CLO packages and selling off bundles

Practically speaking,, the derivative transactions of General Motors would enter into a merger between GM and Chrysler.

The issue would arise in a corporate reorganization in bankruptcy.

The relevant issues would be reconciled by determining the probability of a court reversal on specific transactions or groups of derivative transactions.

In addition to potential Court reversals, accountants must be concerned about volatility in the markets as evidenced by the VIX index.

Beyond derivative transactions, accountants must be concerned about SEC filings of 13F documents at or around the interim periods. Section 13F of the Securities Exchange Act of 1934 requires institutional investment managers exercising investment discretion over \$100MM or more in 13(F) securities to file. These parties include banks, insurance companies, broker/dealers, institutional investment managers, corporations and pension funds managing their own investment portfolios. Rules 201,202 provide for hardship cases.

If you control another entity or are controlled by another entity, a shared-definable investment discretion is applicable. In some well defined instances, confidential treatment may be applied for open risk arbitrage transactions to afford a reasonable period to liquidate a risk arbitrage position.

International law provides for the legal interpretation of contracts in accordance with host country requirements and longstanding international legal protocols. i.e.

- o Principle of Comity wherein one nation will defer and give effect to the laws and judicial decrees of another nation, as long as those laws and judicial decrees are consistent with the law and public policy of the accommodating nation
- o Under certain conditions, the doctrine of soverign immunity immunizes foreign nations from the jurisdiction of USA courts.
- o Choice of language, court forum, dispositive host country legal doctrines
- o Force majeure which stipulates eventualities that excuse contractual parties from non-performance. i.e. Acts of G-d, strikes etc.

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