This proposed FASB Staff Position (FSP) would amend FASB Interpretation No. 48, *Accounting for Uncertainty in Income Taxes*, to include guidance on the application of Interpretation 48 to pass-through entities and tax-exempt not-for-profit entities. In addition, this proposed FSP would modify the disclosure requirements of Interpretation 48 for nonpublic entities as that term is defined in FASB Statement No. 109, *Accounting for Income Taxes*. This proposed FSP addresses the following three issues relating to the application of Interpretation 48 to pass-through entities and tax-exempt not-for-profit entities:

1. Definition of a tax position
2. Attribution of income taxes to the entity or its owners
3. Financial statements of a group of related entities.

The Board invites individuals and organizations to send written comments on all matters in this proposed FSP. Comments are requested from those who agree with the provisions of this proposed FSP as well as from those who do not. Comments are most helpful if they identify the issues to which they relate and clearly explain the issue or question. Those who disagree with provisions of this proposed FSP are asked to describe their suggested alternatives, supported by specific reasoning.

The Board requests that constituents provide comments on the following:

1. This proposed FSP has taken a principles-based approach to provide guidance on the application of Interpretation 48 to pass-through entities and tax-exempt not-for-profit entities. Will the guidance enable those entities to properly apply Interpretation 48? If not, how should the guidance be improved?

2. Paragraph 8 of this proposed FSP identifies four issues related to questions about the implementation of Interpretation 48 for pass-through entities and tax-exempt not-for-profit entities. The Board decided not to provide guidance on whether or not a tax is an income tax because that issue applies to many types of entities and goes beyond the scope of the current project. Do you agree with the Board’s decision? If not, why not? Are there issues other than those identified in paragraph 8 that the Board should address? If so, please identify those issues and provide suggested guidance. Are there any issues that should not be included? If so, please identify those issues and explain your reasoning.
3. This proposed FSP would modify the disclosure requirements of Interpretation 48 for nonpublic entities, including nonpublic not-for-profit entities, to eliminate the disclosures required by paragraphs 21(a) and 21(b) of that Interpretation. Do you agree with the proposed modification to the disclosure requirements? If not, why not?

Responses must be received in writing by June 17, 2009. Interested parties should submit their comments by email to “director@fasb.org, File Reference: Proposed FSP FIN 48-d.” Those without email may send their comments to “Technical Director, FASB, 401 Merritt 7, PO Box 5116, Norwalk, CT 06856-5116, File Reference: Proposed FSP FIN 48-d.” Responses should not be sent by fax.

All comments received by the FASB are considered public information. Those comments will be posted to the FASB website and included as part of the project record with other project materials.
PROPOSED FASB STAFF POSITION

No. FIN 48-d

Title: Application Guidance for Pass-through Entities and Tax-Exempt Not-for-Profit Entities and Disclosure Modifications for Nonpublic Entities

Date Released: May 18, 2009

Comment Deadline: June 17, 2009

Objective

1. This FASB Staff Position (FSP) amends FASB Interpretation No. 48, *Accounting for Uncertainty in Income Taxes*, to provide guidance on the application of that Interpretation to pass-through entities and tax-exempt not-for-profit entities.

2. In addition, this FSP amends the disclosure requirements of Interpretation 48, eliminating the disclosure requirements of paragraphs 21(a) and 21(b) of that Interpretation for nonpublic entities as defined in FASB Statement No. 109, *Accounting for Income Taxes*, including nonpublic not-for-profit entities.

Background

3. Interpretation 48 was issued in June 2006 and was effective for fiscal years beginning after December 15, 2006. Early adoption was permitted as of the beginning of an entity’s fiscal year, provided that the entity had not issued financial statements, including financial statements for any interim period, for that fiscal year. Paragraph 1 of Interpretation 48 states:

   This Interpretation clarifies the accounting for uncertainty in income taxes recognized in an enterprise’s financial statements in accordance with FASB Statement No. 109, *Accounting for Income Taxes*. . . . the requirements of this Interpretation apply to not-for-profit organizations. This Interpretation also applies to pass-through entities and entities whose tax liability is subject to 100 percent credit for dividends paid (for example, real estate investment trusts and registered investment companies) that are potentially subject to income taxes.
Interpretation 48, however, does not provide examples of how it applies to not-for-profit entities or pass-through entities, such as S Corporations or partnerships.

4. The Board issued FSP FIN 48-2, *Effective Date of FASB Interpretation No. 48 for Certain Nonpublic Enterprises*, in February 2008 to defer the effective date of Interpretation 48 for nonpublic entities as defined in Statement 109 until annual financial statements for fiscal years beginning after December 15, 2007, unless the nonpublic entity is a consolidated entity of a public entity that applies U.S. generally accepted accounting principles (GAAP) or has issued a full set of U.S. GAAP annual financial statements before the issuance of FSP FIN 48-2 using the recognition, measurement, and disclosure requirements of Interpretation 48. The Board concluded that the deferral would give nonpublic entities the necessary time to implement Interpretation 48.

5. After the issuance of FSP FIN 48-2, the Private Company Financial Reporting Committee (PCFRC) and other constituents observed that questions remain about how to apply Interpretation 48 to pass-through entities and not-for-profit entities. In response to those concerns, the Board issued FSP FIN 48-3, *Effective Date of FASB Interpretation No. 48 for Certain Nonpublic Enterprises*, in December 2008. That FSP extended the deferral of the effective date of Interpretation 48 to annual financial statements for fiscal years beginning after December 15, 2008. The Board concluded that the effective date deferral provided by FSP FIN 48-3 would give the Board the time necessary to develop guidance on the application of Interpretation 48 to pass-through entities and tax-exempt not-for-profit entities.

6. The proposed FSP of FSP FIN 48-3 asked that respondents identify specific examples of problems that private entities and not-for-profit entities would encounter in applying Interpretation 48. Respondents identified over 20 issues.

7. The comments and questions identified specific facts and circumstances relating to income taxes that might be paid by pass-through entities to federal, state, local, and foreign jurisdictions. Several comments addressed tax-exempt not-for-profit entities.

8. The Board identified four common issues among the comments and questions. The four issues are:
9. The Board decided not to address whether a tax is an income tax, because the Board believes the determination of whether a tax is an income tax goes beyond the scope of this project. The purpose of this project is to provide guidance for pass-through entities and not-for-profit entities on the application of Interpretation 48. The issue of whether a tax is or is not an income tax is discussed in Statement 109 and applies to all entities, public and nonpublic, whether or not they are pass-through entities or not-for-profit entities. This issue is not new to Interpretation 48.

10. The PCFRC also stated that certain disclosures required by Interpretation 48 were not useful to users of private company financial statements. Some Board members and staff met with users of private company financial statements from the PCFRC and others to discuss the disclosure requirements of Interpretation 48. After confirming that view with users, the Board decided to modify the disclosure requirements for nonpublic entities to eliminate the disclosures required by paragraphs 21(a) and 21(b) of Interpretation 48.

All paragraphs in this FSP have equal authority.
Paragraphs in bold set out the main principles.

FASB Staff Position

Scope

11. The guidance provided by this FSP indicates how the general principles on tax positions, tax attribution, and scope of financial statements of a group of related entities apply to pass-through entities and tax-exempt not-for-profit entities.

12. The elimination of the disclosure requirements in paragraphs 21(a) and 21(b) of Interpretation 48 applies to nonpublic entities as defined in Statement 109 including nonpublic not-for-profit entities.
Objective

13. This FSP clarifies the application of Interpretation 48 to pass-through entities and tax-exempt not-for-profit entities. It also modifies the disclosure requirements of Interpretation 48 for nonpublic entities as defined in Statement 109 to eliminate the disclosures required by paragraphs 21(a) and 21(b) of that Interpretation.

Key Principle of Interpretation 48 Addressed in This FSP

14. The overriding principle is that all entities are subject to Interpretation 48, even if the only tax position in question is the entity’s status. Additionally, even if it is more likely than not that the entity’s status as a pass-through entity or tax-exempt not-for-profit entity would be sustained upon examination, the entity may have other tax positions to consider that fall within the scope of Interpretation 48. For example, an S corporation may determine that its status as a pass-through entity is more likely than not to be sustained upon examination. However, the entity may have taken a tax position related to the built-in gains tax that would need to be addressed in accordance with the requirements of Interpretation 48.

Definition of a Tax Position

15. The term tax position as used in this FSP is the same as that term is defined in paragraph 4 of Interpretation 48.

16. Paragraph 4 of Interpretation 48 defines the term tax position as follows:

The term tax position as used in this Interpretation refers to a position in a previously filed tax return or a position expected to be taken in a future tax return that is reflected in measuring current or deferred income tax assets and liabilities for interim or annual periods. A tax position can result in a permanent reduction of income taxes payable, a deferral of income taxes otherwise currently payable to future years, or a change in the expected realizability of deferred tax assets. The term tax position also encompasses, but is not limited to:

a. A decision not to file a tax return
b. An allocation or a shift of income between jurisdictions
c. The characterization of income or a decision to exclude reporting taxable income in a tax return
d. A decision to classify a transaction, entity, or other position in a tax return as tax exempt.

17. Pass-through entities and tax-exempt not-for-profit entities might be subject to the same tax positions encountered by other types of entities. For example, issues that may cause tax uncertainties (that is, exposure to additional income taxes) include those that may arise from any of the following:

a. Failure to file income tax returns or to pay income taxes  
b. The underreporting of taxable income that may result from underreporting income and/or overstating deductible expenses  
c. Challenges to taxpayer status.

18. Several common tax positions must be considered by pass-through entities and tax-exempt not-for-profit entities. One such tax position is the entity’s tax status. Management must determine whether the entity is in fact a pass-through entity or a tax-exempt not-for-profit entity in the jurisdictions in which it files a return or would otherwise be subject to income taxes.

19. Another tax position that a pass-through entity or a tax-exempt not-for-profit entity must consider is whether the entity has nexus in jurisdictions in which it has income. If the entity has nexus, another tax position to consider is whether the entity should have filed a tax return in those jurisdictions. As stated above, a decision not to file a return is a tax position.

20. In addition, a tax-exempt not-for-profit entity must assess whether it has any tax positions associated with unrelated business income subject to income taxes.

21. The existence of a tax position is separate from the consideration of uncertainty in that tax position. For example, if an entity treats an expense as fully deductible in its tax return, that is a tax position. In applying the recognition requirements of Interpretation 48, the entity must then determine the level of uncertainty associated with that tax position.

22. The following examples illustrate the application of these principles:
a. Entity A has sales in Jurisdiction S but no physical presence. Management has reviewed the nexus rules for filing a return in Jurisdiction S and must determine whether filing a tax return in Jurisdiction S is required. In evaluating the tax position to file a tax return, management should consider all relevant sources of tax law. The evaluation of nexus has to be made for all jurisdictions where Entity A might be subject to income taxes. Each of these evaluations results in tax positions that are subject to the recognition, measurement, and disclosure requirements of Interpretation 48.

b. Entity S converted to an S Corporation from a C Corporation effective January 1, 20X0. In 20X7, Entity S disposed of assets subject to built-in gains and reported a tax liability on its 20X7 tax returns. Tax positions to consider related to the built-in gains tax include, but are not limited to, (1) whether other assets were sold subject to the built-in gains tax, (2) whether the income associated with the calculation of the taxable amount of the built-in gains is correct, and (3) whether the basis associated with the built-in gains calculation is correct. It should be noted that whether or not Entity S is subject to the built-in gains tax also is a tax position subject to the provisions of Interpretation 48.

c. Entity N, a tax-exempt not-for-profit entity enters into transactions that may be subject to income tax on unrelated business income. Tax positions to consider include but are not limited to (1) Entity N’s characterization of its activities as related or unrelated to its exempt purpose, (2) Entity N’s allocation of revenue between activities that relate to its exempt purpose and those that are allocated to unrelated business income, and (3) the allocation of Entity N’s expenses between activities that relate to its exempt purpose and those that are allocated to unrelated business activities. Even if Entity N were not subject to income taxes on unrelated business income, a tax position it still has to consider is whether or not it qualifies as a tax-exempt not-for-profit entity.

Attribution of Income Taxes to the Entity or Its Owners

23. Management must determine whether the laws and regulations of the taxing jurisdiction attribute income taxes to the entity or its owners. That determination is a tax position subject to the requirements of Interpretation 48. If the taxing jurisdiction’s laws and regulations attribute income taxes to the entity, amounts due to or from the taxing jurisdiction shall be classified as income taxes and the recognition, measurement, and disclosure provisions of Interpretation 48 must be applied to those income taxes. If the taxing jurisdiction’s laws and regulations
attribute income taxes to the owners, amounts due to or from the taxing jurisdiction shall be classified as a transaction with owners.

24. Many questions have been posed about whether the income taxes associated with a pass-through entity should be classified as income tax expense or as a transaction with owners. The questions arise because jurisdictions have different ways of assessing income taxes. Some impose the tax directly on the entity. Others impose the tax directly on the owners. Still others allow the entity to pay the tax on behalf of the owners of the entity. In cases in which the entity remits the tax on behalf of the owners, some jurisdictions allow the owners to claim a refund if the taxes submitted by the entity are greater than the taxes that would have been owed by the owners had they filed and paid the income tax themselves. In other jurisdictions, the owners are not permitted to file a claim for refund. There are many versions of this scenario because of the large number of taxing jurisdictions.

25. Whether income taxes are attributable to the entity or its owners shall be based on the laws and regulations of the taxing authority rather than on who pays the income taxes. Attribution shall not be based on obligations imposed by agreements between the entity and its owners. The taxing jurisdiction often will collect income taxes from the entity because it is administratively easier, but the laws and regulations indicate that the payments are on behalf of the owners. Some jurisdictions allow the owners to utilize payments made by the entity if they choose to file an income tax return. In both of these situations, the evidence points to attribution to the owners even though the entity is making the payments.

26. The following examples illustrate those principles:

a. Entity A, a partnership with two partners—Partner 1 and Partner 2—has nexus in Jurisdiction J. Jurisdiction J assesses an income tax on Entity A and allows Partners 1 and 2 to file a tax return and use their pro rata share of Entity A’s income tax payment as a nonrefundable credit. Because the owners may file a tax return and utilize Entity A’s payment as a credit against their personal income tax, the income tax would be attributed to the owners by Jurisdiction J’s laws whether or not the owners file an income tax return. Because the income tax has been attributed to the owners, payments to Jurisdiction J for
income taxes should be treated as a transaction with the owners. The result would not change even if there were an agreement between Entity A and its two partners requiring Entity A to reimburse Partners 1 and 2 for any taxes the partners may owe to Jurisdiction J. This is because attribution is based on the laws and regulations of the taxing authority rather than on obligations imposed by agreements between an entity and its owners.

b. If the fact pattern in paragraph 26(a) changed such that Jurisdiction J has no provision for the owners to file tax returns and the laws and regulations of Jurisdiction J do not indicate that the payments are made on behalf of Partners 1 and 2, income taxes are attributed to Entity A on the basis of Jurisdiction J’s laws.

c. Entity S, an S Corporation, files a tax return in Jurisdiction J. An analysis of the laws and regulations of Jurisdiction J indicates that Jurisdiction J can hold Entity S and its owners jointly and severally liable for payment of income taxes. The laws and regulations also indicate that if payment is made by Entity S, the payments are made on behalf of the owners. Because the laws and regulations attribute the income tax to the owners, regardless of who pays the tax, any payments to Jurisdiction J for income taxes should be treated as a transaction with its owners.

Financial Statements of a Group of Related Entities

27. Regardless of the tax status of a consolidated or combined reporting entity, the consolidated or combined financial statements shall include all tax positions for each entity within the consolidated or combined group that is subject to income taxes or that has taxable income assigned to it from a pass-through entity. Determining which entities should be included in the reporting entity’s financial statements shall be based on the application of GAAP.

28. The following example illustrates those principles in the first sentence of paragraph 27:

Entity A, a partnership with two partners, owns a 100 percent interest in Entity B and is required to issue consolidated financial statements. Entity B is a taxable entity that has unrecognized tax positions and a related liability for unrecognized tax benefits. Because entities within a consolidated or combined group should consider the tax positions of all entities within the group regardless of the tax status of the reporting entity,
Entity A shall include in its financial statements the assets, liabilities, income, and expenses of both Entity A and Entity B, including those relating to the application of Interpretation 48 to Entity B. This is true even though Entity A is a pass-through entity.

**Effective Date and Transition**

29. This FSP shall be effective upon issuance for all entities currently applying the provisions of Interpretation 48. For entities that have deferred the application of Interpretation 48, this FSP shall be applied upon initial adoption of Interpretation 48 (that is, annual financial statements for years beginning after December 15, 2008).
Appendix

AMENDMENTS TO INTERPRETATION 48

A1. Interpretation 48 is amended as follows: [Added text is underlined and deleted text is struck out.]

a. Paragraph 4(e) is added as follows:

An entity’s status as a pass-through entity or a tax-exempt not-for-profit entity.

b. Paragraph 21:

21. A public enterprise shall disclose the following at the end of each annual reporting period presented:

   a. A tabular reconciliation of the total amounts of unrecognized tax benefits at the beginning and end of the period, which shall include at a minimum:
      (1) The gross amounts of the increases and decreases in unrecognized tax benefits as a result of tax positions taken during a prior period
      (2) The gross amounts of increases and decreases in unrecognized tax benefits as a result of tax positions taken during the current period
      (3) The amounts of decreases in the unrecognized tax benefits relating to settlements with taxing authorities
      (4) Reductions to unrecognized tax benefits as a result of a lapse of the applicable statute of limitations
   b. The total amount of unrecognized tax benefits that, if recognized, would affect the effective tax rate

21A. All entities shall disclose the following at the end of each annual reporting period presented:

   ea. The total amounts of interest and penalties recognized in the statement of operations and the total amounts of interest and penalties recognized in the statement of financial position
   db. For positions for which it is reasonably possible that the total amounts of unrecognized tax benefits will significantly increase or decrease within 12 months of the reporting date:
       (1) The nature of the uncertainty
       (2) The nature of the event that could occur in the next 12 months that would cause the change
(3) An estimate of the range of the reasonably possible change or a statement that an estimate of the range cannot be made

e.g. A description of tax years that remain subject to examination by major tax jurisdictions.

c. Paragraphs A34—A40 and the headings preceding them are added as follows:

Note: The following examples do not represent the tax policies of actual taxing authorities but are presented to provide guidance to illustrate how pass-through entities and tax-exempt not-for-profit entities should approach the implementation of this Interpretation.

**Definition of a Tax Position**

A34. Entity A has sales in Jurisdiction S but no physical presence. Management has reviewed the nexus rules for filing a return in Jurisdiction S and must determine whether filing a tax return in Jurisdiction S is required. In evaluating the tax position to file a tax return, management should consider all relevant sources of tax law. The evaluation of nexus has to be made for all jurisdictions where Entity A might be subject to income taxes. Each of these evaluations results in tax positions that are subject to the recognition, measurement, and disclosure requirements of this Interpretation.

A35. Entity S converted to an S Corporation from a C Corporation effective January 1, 20X0. In 20X7, Entity S disposed of assets subject to built-in gains and reported a tax liability on its 20X7 tax returns. Tax positions to consider related to the built-in gains tax include, but are not limited to, (a) whether other assets were sold subject to the built-in gains tax, (b) whether the income associated with the calculation of the taxable amount of the built-in gains is correct, and (c) whether the basis associated with the built-in gains calculation is correct. It should be noted that whether or not Entity S is subject to the built-in gains tax also is a tax position subject to the provisions of this Interpretation.

A36. Entity N, a tax-exempt not-for-profit entity enters into transactions that may be subject to income tax on unrelated business income. Tax positions to consider include but are not limited to (a) Entity N’s characterization of its activities as related or unrelated to its exempt purpose, (b) Entity N’s allocation of revenue between activities that relate to its exempt purpose and those that are allocated to unrelated business income, and (c) the allocation of Entity N’s expenses between activities that relate to its exempt purpose and those that are allocated to
unrelated business activities. Even if Entity N were not subject to income taxes on unrelated business income, a tax position it still has to consider is whether or not it qualifies as a tax-exempt not-for-profit entity.

**Attribution of Income Taxes to the Entity or Its Owners**

A37. Entity A, a partnership with two partners—Partner 1 and Partner 2—has nexus in Jurisdiction J. Jurisdiction J assesses an income tax on Entity A and allows Partners 1 and 2 to file a tax return and use their pro rata share of Entity A’s income tax payment as a nonrefundable credit. Because the owners may file a tax return and utilize Entity A’s payment as a credit against their personal income tax, the income tax would be attributed to the owners by Jurisdiction J’s laws whether or not the owners file an income tax return. Because the income tax has been attributed to the owners, payments to Jurisdiction J for income taxes should be treated as a transaction with the owners. The result would not change even if there were an agreement between Entity A and its two partners requiring Entity A to reimburse Partners 1 and 2 for any taxes the partners may owe to Jurisdiction J. This is because attribution is based on the laws and regulations of the taxing authority rather than on obligations imposed by agreements between an entity and its owners.

A38. If the fact pattern in paragraph A37 changed such that Jurisdiction J has no provision for the owners to file tax returns and the laws and regulations of Jurisdiction J do not indicate that the payments are made on behalf of Partners 1 and 2, income taxes are attributed to Entity A on the basis of Jurisdiction J’s laws.

A39. Entity S, an S Corporation, files a tax return in Jurisdiction J. An analysis of the laws and regulations of Jurisdiction J indicates that Jurisdiction J can hold Entity S and its owners jointly and severally liable for payment of income taxes. The laws and regulations also indicate that if payment is made by Entity S, the payments are made on behalf of the owners. Because the laws and regulations attribute the income tax to the owners, regardless of who pays the tax, any payments to Jurisdiction J for income taxes should be treated as a transaction with its owners.

**Financial Statements of a Group of Related Entities**

A40. Entity A, a partnership with two partners, owns a 100 percent interest in Entity B and is required to issue consolidated financial statements. Entity B is a taxable entity that has unrecognized tax positions and a related liability for unrecognized tax benefits. Because entities within a consolidated or combined group should consider the tax positions of all entities within the group regardless of the tax status of the reporting entity, Entity A shall include in its financial statements the assets, liabilities, income, and expenses of both Entity A and Entity B,
including those relating to the application of this Interpretation to Entity B. This is true even though Entity A is a pass-through entity.