



1840-100
Comment Letter No. 247
1700 NORTH MOORE STREET
SUITE 2250
ARLINGTON, VA 22209
T (703) 841-2300 F (703) 841-1184
WWW.RILA.ORG

September 20, 2010

Russell G. Golden, Technical Director
FASB
401 Merritt 7
PO Box 5116
Norwalk, CT 06856-5116

Dear Mr. Golden:

The Retail Industry Leaders Association (“RILA”) and its Financial Leaders Council (“FLC”) are pleased to respond to the *Proposed Accounting Standards Update, Contingencies* (Topic 450), *Disclosure of Certain Loss Contingencies*, issued by the Board on July 20, 2010 (the “Proposed Standards Update”). RILA is the trade association of the world’s largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than \$1.5 trillion in annual sales, millions of American jobs and more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

RILA and its FLC commented on the Board’s prior Exposure Draft – Proposed Statement of Financial Accounting Standards – Disclosure of Certain Loss Contingencies, an amendment of FASB Statements No. 5 and 141(R) (the “Exposure Draft”). While RILA and the FLC view the Proposed Standards Update as a positive step toward recognizing and addressing the concerns expressed by commentors on the Exposure Draft, many aspects of the Proposed Standards Update continue to be extremely problematic and do not address fully concerns regarding the potential waiver of information and documents otherwise protected by the attorney-client privilege or work product protection. In addition, RILA and the FLC have significant concerns that without the disclosure of prejudicial information, the required disclosures may be misleading to investors. The Proposed Standards Update is considerably different than the current standard (FAS 5) and would require even more judgment and, specifically, heavier reliance on entirely new types of judgments that would have to be made by a company’s attorneys. As a result, we believe that any new standard is not appropriate unless it addresses fully the concerns raised by the legal community and receives the unqualified endorsement of key legal organizations such as the American Bar Association, the Association of Corporate Counsel, and others (many of which commented on the 2008 Exposure Draft).

As a result, RILA and the FLC do not view the Proposed Standards Update as operational unless these remaining, significant issues are appropriately addressed. In any event, given the fundamental changes contained in the Proposed Standards Update, the proposed effective date (for fiscal years ending after December 15, 2010) is viewed as unworkable.

Our specific comments follow:

The Principles Used in Determining Disclosures and the Disclosure Thresholds are Generally Helpful, but Do Not Fully Address All Concerns

The General Principles, ¶ 450-20-50-1B, are helpful in that they recognize that at an early stage of a loss contingency's life cycle, information may be limited. However, a requirement to provide updated information, together with the proposed tabular disclosures, raises considerable concerns that a company's opponent could relatively easily determine how much a reserve has been increased to account for the case development. This, in turn, would provide that adversary with information that is not public or otherwise discoverable and may be based, at least in part, on information that is protected by the attorney client privilege or work product protection.

The ability to aggregate disclosures also is a welcome development. However, for companies that are not faced with a significant number of loss contingencies, the ability to aggregate disclosures is of limited benefit. While most problematic for such companies, another significant concern to all companies would be a requirement to disclose unasserted claims or assessments. ¶ 450-20-50-1C. Because such claims have not been asserted, the disclosures would invariably be of *non*-public information. Such a requirement would be entirely inconsistent with the Proposed Standards Update's requirement elsewhere that only publicly available, non-privileged information be disclosed. Disclosure of non-public information would inevitably intrude on the attorney-client privilege and work product protections and would invite claims where none have, in fact, been asserted and may never, otherwise, be asserted.

In addition, the Proposed Standards Update provides that insurance or indemnification cannot be considered when assessing materiality. ¶ 45-20-50-1E. While we recognize that insurance recoveries may be contested by an insurance company, the entire proposal requires the exercise of significant judgment. An assessment of the risk that an insurance company may contest a claim is, in essence, no different than any of the other contingency judgments that would be required under the Proposed Standards Update. A prohibition against considering insurance recoveries or other forms of indemnification when assessing materiality is counter to the Board's goal of providing the users of financial statements with useful information. For example, what might appear to be a material contingency may, in fact, not be because there is no doubt that any contingent payment would be indemnified by a third party. Failure to allow consideration of the indemnification arrangement or insurance recoveries, in our view, will necessarily provide an inaccurate and misleading assessment of materiality.

The Proposed Standards Update also prohibits disclosure of insurance coverage, except in very limited circumstance. We believe that if the existence of insurance is not permitted to be disclosed, the existence of specific self-insurance reserves, and the amount thereof also should be excluded from disclosure. Failure to exclude self-insurance would place self-insured companies at a disadvantage as compared to those that use only traditional insurance by providing their adversaries with sensitive information that may be based largely on information that is protected by the attorney-client privilege or work product protection.

The Requirement to Disclose Remote Contingencies with a Potential Severe Impact is Not Operational, Would be Misleading, and Would Intrude on the Attorney Client Privilege and Work Product Protection

The requirement to disclose asserted but remote loss contingencies that may have a potential “severe impact,” ¶ 450-20-50-1D, should be eliminated. While RILA and the FLC acknowledge that the Board has attempted to craft a workable method for disclosure of such contingencies, we fear that the disclosure of remote claims because they are determined to have a potential “severe impact” will only serve to enhance the position of parties asserting remote claims, thereby providing likely misleading information to financial statement users. For example, a requirement to disclose remote contingencies could appear to give credence to claims that are no more than a political statement. As an example, a gun manufacturer could be required to disclose a remote, but extremely large claim, made by victim rights advocates merely to advance their political agenda without any real hope of recovery but with an eye toward affecting pending state or federal legislation. Similarly, a drug manufacturer could be forced to disclose a remote claim made by animal rights activists again made primarily to advance their political agenda. Retailers face similar concerns and believe that financial statements should not be used to provide political platforms.

Disclosure of a remote contingency also will have a likely impact on any such contingency in the sense that the position of the party asserting the contingency will likely become more entrenched – thereby making potential settlement more difficult and likely more costly. The mere fact that such claims will have to be disclosed as having a potential “severe impact” changes the otherwise appropriate balance of power in such situations and could force companies to pay far more to settle such claims (generally nuisance value, if anything) than would otherwise be required, all at the expense of the corporation’s shareholders. Additionally, requiring that companies disclose *asserted* remote contingencies but not *unasserted* remote contingencies appears inconsistent – assertion of a claim with little or no merit does not add validity to the claim. We do not believe that assertion provides a relevant distinction that would justify disclosure of any remote contingencies.

Finally, we note that many potential contingencies are already addressed appropriately elsewhere in a public company’s Form 10-K. For example, the required disclosures of risk factors (including, for example, the fact that there exists a potential for various types of claims to be asserted against the company (*e.g.*, remote environmental remediation claims, etc.) should be taken into account by the Board to the extent any changes to the existing standard are ultimately promulgated. In our view, remote contingencies are most appropriately addressed outside of the financial statements.

The Disclosure Requirements Provide Some Welcome Changes, but Certain Issues Still Remain

Disclosure of only “publicly available” information, as would be required under the Proposed Standards Update, is a positive development generally. However, for companies that face a significant number of individually material contingencies, the amount of additional detailed information that would be required to be disclosed could be overwhelming both to the company and financial statement users. ¶ 450-20-50-1Fc. Moreover, the disclosure of significant, additional amounts of information would not appear to address the primary concern expressed by the Board, that “the initial disclosure of specific information about a loss contingency often does not occur until a material accrual is recognized for that loss contingency, sometimes taking investors by surprise.” Disclosure of more information will not address this concern.

Limiting the proposed significant, additional disclosures to only publicly available information, would likely make the financial statements misleading. One of the fundamental characteristics of *useful* financial reporting is that it provides a faithful representation of information to the users of those financial statements. The disclosures required by the Proposed Standards Update could be misleading to users of the financial statements without additional insight from management about a case or action, which is typically non-public and possibly privileged. Faced with disclosures that would be out of context from the full information (including privileged information) necessary for management to make its judgment on the potential timing and magnitude of a loss, a user may not have enough information to understand the contingency fully. Even worse, the user could have just enough information to misunderstand it. For example, to the extent there were non-public settlement discussions under way for a particular claim, these would not be disclosed (because the information is not public) and, accordingly, the disclosure of only publicly available information related to that claim could be misleading about the timing and potential magnitude of the outcome.

The required disclosures for all contingencies that are at least reasonably possible raises similar concerns. The Proposed Standards Update provides that for all contingencies that are at least reasonably possible (and for remote contingencies that meet the disclosure threshold in paragraph 450-20-50-1D) the required quantitative disclosures may need to include the amount claimed by the plaintiff or the amount of damages indicated by the testimony of expert witnesses. ¶ 450-20-50-1Fe-f. In many cases, the expert testimony may be extensive, the damages amounts may differ wildly among the experts, and all such amounts may be entirely inconsistent with any damage amounts asserted in various court filings. Indeed, in our adversarial legal system, such a disclosure requirement we fear will encourage “expert” testimony that provides completely unrealistic estimates of potential damages, which, if required to be disclosed, would be no more than another way for adversaries to gain leverage rather than helpful information for the users of financial statements.

We also question whether all of this information will be helpful to users of financial statements and believe that the significant additional burden that it will place on preparers will greatly

outweigh any perceived benefit. Moreover, a requirement to disclose the amount of loss accrued and the requirement to provide the reasons why a loss or range of loss cannot be estimated directly implicate the attorney client privilege and/or attorney work product protection. Disclosure of the amount of loss accrued also would be extremely prejudicial in any event, as it would set the floor for any future settlement discussions.

The Tabular Reconciliation Continues to be Problematic

The information proposed to be required in tabular format is somewhat less intrusive and problematic generally, than the tabular information that would have been required under the Exposure Draft, but *only* if the information were provided on a fully aggregated basis (and not on a class basis as set forth in the Proposed Updated Standards). ¶ 450-20-50-1Fg. For companies without the ability to sufficiently aggregate claims and for companies that had only one or a few newly disclosed contingencies, however, the tabular reconciliation would be particularly problematic. The proposed tabular disclosures could have the unintended consequence of vitiating the work product doctrine because it is necessarily based, in large part, on the mental impressions and opinions of counsel. The tabular disclosures, similar to the disclosure of any remote contingencies and all contingencies that are at least reasonably possible, would create an uneven playing field. Similarly, the requirement to show adjustments to the reserves could easily provide an opposing party with information that is *not* public or otherwise discoverable and which is wholly dependent upon the assessments of counsel. Again, the financial statement requirement should not create an uneven playing field. For example, if a reserve were increased, the other party to a litigation would, in essence, have access to information regarding the company's view of its settlement position. The increase in administrative or operational costs of such a proposal would be high. But the larger cost is the inevitable increase in the amounts that companies would have to pay to resolve contingent claims. Thus, the full cost of such disclosures would far outweigh any perceived benefit.

Moreover, we believe that tabular disclosure of loss contingencies, and litigation contingencies in particular, are more intrusive than similar requirements elsewhere in GAAP due to the nature of the information the Proposed Standards Update would require to be disclosed. For example, concerns were raised by constituents in reviewing the exposure draft for FASB Interpretation No. 48, *Accounting for Uncertainty in Income Taxes*, related to the tabular disclosure requirement in that standard. The Board's bases for rejecting the argument that such a disclosure would provide taxing authorities a "roadmap" for challenging company tax positions included that a taxing authority, unlike a counterparty in a lawsuit, is acting in the broader public interest rather than its own interest. Also the Board noted the ability to *fully* aggregate all information about tax positions would provide users information that is decision useful as well as not reveal information about individual positions. In the context of the Proposed Standards Update, constituents are faced with counterparties that are acting in their *own* interest and would not have the ability to fully aggregate information for tabular reconciliations. We believe that the potential for prejudicial information to be included in these reconciliations to be far greater than for existing tabular disclosure required elsewhere under GAAP.

Additional Types of Transactions Excluded from the Scope of any Final Pronouncement

The Proposed Standards Update excludes from its scope certain types of transactions. ¶ 450-20-15-2. In our view, other types of transactions or items also should be excluded from the scope of the Proposed Standards Update. Specifically, we concur that any final pronouncement should exclude from its scope uncertainty in income taxes. However, we believe that all tax uncertainties (including, for example, excise taxes and other non-income types of taxes) should similarly be excluded.

The Proposed Effective Date is Unworkable

Although the Board's Proposed Updated Standards addresses many of the concerns raised by commentors in connection with the Exposure Draft, some significant concerns remain to be addressed. Even if the privilege and work product concerns were fully addressed, however, the sheer amount of additional information that would be required to be reported is vastly different than what is required currently and for companies with significant numbers of loss contingencies, the current proposed effective date (fiscal years ending after December 15, 2010), is simply unrealistic. In addition, companies are facing the likelihood of many potential changes as the Board and the IASB move forward with their convergence efforts. We would encourage the Board to reconsider whether the measures necessary to be taken to comply with a fundamentally different standard than currently exists by the end of this fiscal year will take away from companies' ability to effectively participate in the due process critically important to the quality of the convergence-related standards.

Moreover, the current standard has been in place for a considerable period of time, has, in our view, worked well, and to the extent any changes are made, we see no reason to require immediate adoption of a materially different standard. If a final revised standard were adopted, RILA and the FLC agree with the Board's proposal to delay the effective date by at least one year for non-public companies. As discussed above, we believe that any changes made to the current standard should not be made unless and until it receives the unqualified endorsement of the legal profession.

RILA and the FLC, again appreciate the opportunity to provide the Board with our comments.

Respectfully,



Casey Chroust
Executive Vice President, Retail Operations
Retail Industry Leaders Association