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August 8, 2008

Robert H. Herz
Chairman
Financial Accounting Standards Board
401 Merritt 7
P.O. Box 5116
Norwalk, CT 06856-5116

Re: File Reference No. 1600-100
Exposure Draft – Proposed Statement of Financial Accounting Standards – Disclosure of Certain Loss Contingencies, an amendment of FASB Statements No. 5 and 141(R)

Dear Chairman Herz,

The Retail Industry Leaders Association (“RILA”) and its Financial Leaders Council (“FLC”) are pleased to respond to the Financial Accounting Standards Board’s (“FASB” or “Board”) request for comments on its reconsideration of FASB Statement No. 5 – Accounting for Contingencies (“FAS 5”) set forth in 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”). RILA and its FLC are very concerned with the inevitable consequences that would ensue if certain of the expanded disclosures related to pending or threatened litigation set forth in the Exposure Draft were required.

RILA is an alliance of the world’s most successful and innovative retailer and supplier companies – the leaders of the retail industry. RILA members represent more than \$1.5 trillion in sales annually and operate more than 100,000 stores, manufacturing facilities and distribution centers nationwide. Its member retailers and suppliers have facilities in all 50 states, as well as internationally, and employ millions of workers domestically and worldwide.

RILA believes that the additional disclosures proposed in the Exposure Draft are not warranted and are not operational. Therefore, we oppose adoption of the amendments proposed in the Exposure Draft. We address below certain specific issues.

Many Of The Exposure Draft’s Proposals Will Not Enhance FAS 5

FAS 5 currently requires that if a loss is probable, or likely to occur, and can be reasonably estimated, a liability must be accrued for the loss contingency. Where a loss is not probable, but there is “at least a reasonable possibility that a loss or an additional loss may have been incurred” and the amount of the loss “can be reasonably estimated,” disclosure of the nature of the contingency and an estimate of the possible loss or range of loss must be made. If the

amount of the loss or a range cannot be determined, the disclosure must include a statement that such an estimate cannot be made. FAS 5, ¶ 10.

The stated purpose of the changes proposed in the Exposure Draft is to “enhance” the requirements of FAS 5. According to the Exposure Draft, the proposed amendment would (1) expand the loss contingencies that would be required to be disclosed; (2) require additional specific qualitative and quantitative disclosures about the expanded universe of loss contingencies; and (3) require a tabular reconciliation of certain loss contingencies. The Exposure Draft also attempts to provide an exemption from disclosing certain information if disclosure would be prejudicial; but, as we discuss below, that exemption is ineffective as presently drafted.

The Exposure Draft Is Inconsistent With The Board’s Desire to Move Toward More Principles-Based Accounting Standards

First and foremost, the Exposure Draft appears inconsistent with the Board’s stated desire to move toward more principles-based accounting standards. The overall objective of the joint conceptual framework project of the FASB and the International Accounting Standards Board (“IASB”), is to develop an improved common conceptual framework that provides a sound foundation for developing future accounting standards. “*Such a framework is essential to fulfilling the Boards’ goal of developing standards that are principles-based, internally consistent, and internationally converged and that lead to financial reporting that provides the information capital providers need to make decisions in their capacity as capital providers. [emphasis added]*”¹ Indeed, the blueprint suggested by Chairman Herz for moving all U.S. public companies to an improved version of IFRS includes the need to establish a framework to enable the use of more principles-based accounting standards.²

RILA and its FLC support the Board’s goal of more principles-based accounting standards, as well as its goals of improving transparency, timeliness, and usefulness of financial information. However, many of the Exposure Draft’s proposed revisions to FAS 5 are inconsistent with these goals. FAS 5, which has been in existence for over 30 years, is one of the more principles-based and well-understood accounting standards in existence today.

Because it is a principles-based standard, there is a significant amount of judgment involved in applying the existing version of FAS 5. While overlaying FAS 5 with additional rules would create new disclosures, those rules are inconsistent with the goal of moving toward more principles-based standards. In our view, these new disclosures would make the financial

¹ See project description at http://72.3.243.42/project/conceptual_framework.shtml.

² Statement of Robert H. Herz, Chairman, FASB, Before the Subcommittee on Securities, Insurance and Investment, Committee on Banking, Housing, and Urban Affairs, United States Senate, on “International Accounting Standards: Opportunities, Challenges, and Global Convergence Issues,” at 7, October 24, 2007.

statements less transparent and introduce more uncertainty through the inclusion of additional disclosures that imply a false sense of precision. While there may be times when reporting companies have not timely disclosed material litigation contingencies based on the principles established in FAS 5, the poor judgment of a few does not warrant additional, and unworkable, rules-based disclosures. We believe that the existing disclosure requirements of FAS 5 are sufficient to provide users of financial statements reliable information about loss contingencies that could have a material impact to the financial statements.³

We also understand that the Board views the new disclosure requirements proposed in the Exposure Draft to be consistent with IAS 37. Based on the experience of our members with global operations, litigation in countries outside of the United States is far different than the type, scope, and amount of litigation faced by U.S. reporting companies.⁴ Thus, we believe that a convergence toward IAS 37 does not appropriately take into consideration the vast differences between the U.S. and non-U.S. legal systems.

Several Of The Rules Proposed In The Exposure Draft Are Problematic – The Costs That Would Result If These Rules Were Enacted Would Far Outweigh Any Perceived, But Non-Existent, Benefit

The Exposure Draft proposes numerous additional quantitative and qualitative disclosures. It also would greatly increase the type of contingencies that would have to be disclosed and introduce a new, undefined term into the FAS 5 lexicon – “severe impact,”⁵ which is not well-defined. Several of these proposed new rules are problematic, as further outlined below.

Reporting Companies Should Not Be Required To Guess At The Amount Of Damages Sought

In terms of quantitative disclosures, the Exposure Draft would require that in the absence of a specific amount of damages sought by an actual or potential plaintiff, the reporting company must disclose the company’s “maximum exposure” to the claim. If the maximum exposure is

³ To the extent the existing disclosure requirements are not adhered to by all reporting companies in the manner intended by the Board (and the SEC), continued focus on and enforcement of this area by the SEC, as part of its comment letter review process, should address these concerns.

⁴ For example, tort litigation in the United States differs substantially from tort litigation in other countries.

⁵ Under the Exposure Draft, even a “remote” contingency would have to be disclosed if it was expected to be resolved within one year from the date of the financial statements and the contingency could have a “severe impact” on the entity’s financial position, cash flows, or results of operations.

not, in the company's view, representative of the actual exposure, the company may disclose instead its best estimate of the range of possible loss.

RILA believes reporting companies should not have to guess at the amount of damages where a claimant has not specified a damages amount. Unfortunately, U.S. society is extremely litigious and many suits or threatened suits are merely vexatious. Often, especially early in any lawsuit or where a claim is threatened but has not yet been filed in court, reporting companies have little information from which to evaluate a claim. With respect to filed lawsuits, because many forums require only notice pleading, the alleged facts underlying the claim are not detailed with any particularity, and it is difficult, if not impossible for a reporting company to evaluate the claim prior to a sufficient amount of discovery taking place. For claims that are only threatened, there is generally even less information available to the reporting company.

Moreover, where a plaintiff or potential plaintiff has not specified an amount of sought damages, disclosure of any amount of potential liability by the reporting company, or a range of potential loss, could be deemed to be an admission that an adversary could then attempt to use to establish liability, even though the company believes that the claims are without merit.⁶ Quantification of a reporting company's "maximum exposure," whether a specific number or a range, also will necessarily be incorrect and unreliable and would, inappropriately, provide substantial leverage to the reporting company's adversary and potentially lead to "copycat" lawsuits by other claimants, thereby further increasing costs to the reporting company with no corresponding benefit. Where claims are only threatened, required disclosure of a reporting company's guess at the potential exposure from such claims also will ensure that those claims materialize. Further, because the reporting company's estimate may be "wrong," the likelihood of further litigation should those estimates ultimately prove incorrect is extremely high, thereby creating even more additional cost to the reporting company and its shareholders with no offsetting benefit to the reporting company, its shareholders, or the users of its financial statements.⁷ Aggregation of similar claims would only exacerbate these issues. Finally, as discussed below, the qualitative disclosures relating to such estimates raise significant privilege concerns.

Where A Claim Is Specific, Reporting Companies Should Be Permitted To Disclose That Amount Without Creating Any Adverse Inference

Under the Exposure Draft, where a claim specifies an amount, the reporting entity must disclose that amount. It goes on to state, however, that "[a]n entity also may disclose its best

⁶ Often, reporting companies will settle claims where the cost to litigate a claim is in excess of the amount that it can pay to settle the claim.

⁷ Such estimates would be highly judgmental, rife with uncertainty, and because the PSLRA safe harbor for forward-looking statements would not be available, could lead to further litigation if the actual amounts ultimately were materially different from the estimates.

estimate of the possible loss or range of loss if it believes that the amount of the claim or assessment . . . is not representative of the entity's actual exposure." While likely well intentioned, this provision is too limited and, therefore, is problematic.

To the extent a reporting company was unable to reliably estimate what it believes its maximum exposure is, disclosure of the plaintiff's claim amount (or the amount set forth in a threatened claim) could arguably constitute an admission that the reporting company agrees that the claimed amount is representative of its actual exposure. Again, the problem arises because, especially early in lawsuits, or in connection with most threatened claims, reporting companies simply do not possess enough information from which to determine a reliable estimate of its potential exposure, if any.

Even if such an estimate were possible, required disclosure of that amount would be inappropriate. Often, plaintiffs who specify an amount of damages provide a "boxcar" number that bears no relation to what they truly believe are their damages, what a court could ultimately determine are their damages, or what they would actually accept in settlement of the claim. Required disclosure by the reporting company of what it believes is its actual exposure would provide plaintiffs an unfair advantage because they would be under no similar obligation to "show their hand." In summary, RILA and its FLC recommend that reporting companies be required to disclose the amount of specific claims only if required under existing FAS 5 disclosure requirements.

Several Of The Proposed Additional Quantitative Disclosures Are Also Problematic

The Exposure Draft would mandate additional quantitative disclosures whether or not a contingency accrual were required: (1) a description of the loss contingency; (2) the anticipated timing of the contingency's resolution; (3) the factors likely to affect the outcome of the contingency, along with their potential effect on the outcome; (4) a qualitative assessment of the most likely outcome; and (5) assumptions underlying the company's quantitative assessment of the contingency. The Exposure Draft also would require that a tabular reconciliation be provided of the total amount recognized for the contingencies at the beginning and end of the reporting period. The reconciliation must include, at a minimum, increases for loss contingencies recognized during the period, increases resulting from changes in estimates of the amounts of loss contingencies previously recognized; decreases resulting from changes in estimates or derecognition of loss contingencies previously recognized; and decreases resulting from cash payments (or other forms of settlement) for loss contingencies.

Disclosure of a description of the loss contingency is not particularly problematic. Disclosure of the anticipated timing of the contingency's resolution would not be problematic if what the Board is proposing is simply the reporting company's disclosure of, for example, a trial date, scheduled mediation or arbitration, anticipated length of trial/mediation/arbitration, statement that settlement discussions are under way, schedule for any appeal rights, date of oral argument in an appellate court, etc. To the extent the Board seeks a prediction of the actual date

of resolution, that information is wholly or at least in part outside the control of the reporting company. For example, the length of time a judge may take to write an opinion, or whether a case will be appealed by an opponent, is outside the control of the reporting company and not reliably estimable.⁸ Thus, while disclosure of some additional information may be appropriate, RILA and its FLC urge the Board to limit any required disclosures to information that is appropriately reliable.

The remaining categories of proposed additional disclosures, as well as the tabular reconciliation, are extremely problematic. Even if one could overcome the reliability issues discussed above, the additional disclosures also would have the unintended consequence of vitiating the work product doctrine protections that would otherwise apply to such information to the extent it contains or is based upon the mental impressions or analysis of the reporting company's counsel. Even more problematic is the potential for a reporting company's adversaries to argue successfully that the disclosures constitute a waiver of any attorney-client privilege claims that would otherwise be available and that the waiver is not just of the information presented, but causes a broad subject matter waiver. Thus, the disclosures, if required, would create an uneven playing field. Reporting companies would be required to disclose information otherwise protected by either the work product doctrine or the attorney-client privilege while nothing would require disclosure by the reporting company's adversaries of the same or similar information. Moreover, we believe reporting companies, and ultimately their shareholders, would be faced with substantially increased costs associated to defend any attorney-client waiver claims.

Disclosure of Remote Contingencies Will Not Improve Financial Statements

Under the Exposure Draft, even a "remote" contingency would have to be disclosed if it was expected to be resolved within one year from the date of the financial statements and the contingency could have a "severe impact" on the entity's financial position, cash flows, or results of operations. RILA does not believe that disclosure of remote contingencies, in general, would improve the quality of financial statements. As discussed above, even where a contingency is not "remote," a reliable estimate of the amount of potential loss is not possible. Where the reporting company considers a loss to be remote, any quantification of potential loss is even more speculative and unreliable.

The Exposure Draft's introduction of a new threshold – "severe impact," also is problematic. First, if, as is likely, the reporting company cannot reliably estimate the amount of a potential loss for a remote claim, it would be inappropriate to use the claim amount. Also, "severe impact" is not well defined. Disclosure of remote contingencies also will inevitably increase litigation. If a reporting company classifies a contingency as remote, but that

⁸ Similarly, if the reporting company were to make a settlement offer or counteroffer, it is not possible for the reporting company to predict when, or if, the opposing party will accept the offer or counter offer. Thus, RILA believes that specific information as to the amount of any settlement offers or counteroffers should not be required to be disclosed.

contingency ultimately comes to fruition, then the reporting company will inevitably be defending additional suits regarding to its determination that the contingency was remote.

The Limited “Prejudice” Exception To Disclosure Is Ineffective

The proposed amendments include a limited exception to the disclosure requirements if the disclosure of “certain information” – which is undefined in the Exposure Draft – regarding a loss contingency would be “prejudicial” to the reporting company. The Board expects use of this non-disclosure exception to be “rare.” Even if this exception were technically available, the Exposure Draft’s requirement that the reporting company state the reason for non-disclosure and the requirements that the reporting company estimate its maximum exposure, if no claim amount is specified, and provide a description of the factors that are likely to affect the ultimate outcome of the contingency along with their potential impact on the outcome, ensures that the “exception” would never provide any actual relief.

Conclusion

RILA and its FLC believe that, while well intentioned, the Exposure Draft, if adopted, will not improve financial reporting and will erode shareholder value through increased litigation and compliance costs. Therefore, we oppose finalization of the Exposure Draft in its current form.

In summary, we recommend the following:

- Retention of the disclosure threshold currently contained in FAS 5 (reasonably possible)
- For claims that must be disclosed, a description of the nature of the claim similar to what is currently required under Regulation S-K⁹
- Disclosure related to the timing of resolution of disclosed claims should include only appropriately reliable information, such as discovery schedules, scheduled trial dates, mediation or arbitration dates, briefing schedules, date by which an appeal may be filed, the fact that there are ongoing settlement discussions, etc.

The remaining proposals set forth in the Exposure Draft should not be adopted.

⁹ Regulation S-K requires that the issuer disclose “the name of the court or agency in which the proceedings are pending, the date institutes, the principal parties thereto, a descriptions of the factual basis alleged to underlie the proceeding and the relief sought.” 17 CFR 229.103.

Robert H. Herz, Chairman

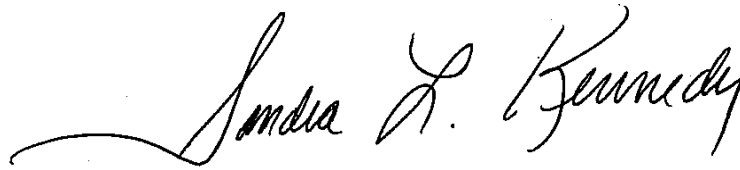
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Should the Board move forward with any changes to FAS 5, which we do not believe is warranted, we recommend that the effective date of any new disclosure requirements be deferred.

RILA and its FLC thank you for the opportunity to respond to the Exposure Draft.

Sincerely,

A handwritten signature in black ink that reads "Sandra L. Kennedy". The signature is written in a cursive style with a long, sweeping underline that extends to the left.

Sandra L. Kennedy
President
Retail Industry Leaders Association