



March 28, 2007

## Via Email and Express Overnight

Ms. Suzanne Q. Bielstein Director – Major Projects and Technical Activities Financial Accounting Standards Board 401 Merritt 7 P.O. Box 06856-5116 Norwalk, CT 06856-5116

Re: Proposed FSP FIN 48-a—Definition of Settlement in FASB Interpretation No. 48

Dear Ms. Bielstein:

The Retail Industry Leaders Association (RILA) and its Financial Leaders Council appreciate the opportunity to provide comments on the proposed FSP, FIN 48-a – Definition of Settlement in FASB Interpretation No. 48.

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 \$1.4 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.

We continue to believe that the implications of FIN 48 are of such significance, that a delay in its effective date would have been the most appropriate course. In addition to the financial statement implications, FIN 48 also raises significant issues under Sarbanes-Oxley and has caused the Internal Revenue Service to revisit its policy on seeking audit and tax accrual work papers. Should the Internal Revenue Service change its position, significant attorney-client privilege and work product doctrine issues would arise and may result in enterprises seeking less written tax advice.

Notwithstanding our belief that FIN 48 could lead to less reliable financial statements, RILA commends the goal of the proposed FSP to clarify that a tax position can be effectively settled upon examination by a taxing authority. We do, however, believe that further clarifications are necessary. First, the proposed FSP provides that before a tax position may be considered effectively settled, the enterprise must consider it "highly unlikely" that the taxing authority would subsequently examine or reexamine any aspect of the tax position. The term "highly unlikely" is not defined in the literature and is unclear. RILA suggests that the term be replaced

with "probable," and that the test be modified to provide that effective settlement would occur when it is "probable that the taxing authority would not subsequently examine or reexamine any aspect of the tax position." Second, RILA believes that the phrase "presuming the taxing authority has full knowledge of all relevant information" is confusing and unnecessary. Third, RILA believes that there should be guidance as to how non-filing positions are to be evaluated. A major concern in this regard relates to state taxation issues, in particular, issues relating to whether a company has nexus in a particular state.

As an example, Company X has reviewed its state tax exposures and believes that one of its subsidiaries has a potential nexus exposure in State A where it has never filed a return for that subsidiary (although the company or its other subsidiaries may file in State A). Company X had previously recorded (pre FIN 48) a reserve that is its best estimate of the expected liability (a risk-based economic exposure) for the expected number of years that State A would likely include in settlement discussions (generally the number of federal years open). Adopting FIN 48, the Company has determined that on its technical merits, primarily due to limited case law in that state and generally more aggressive postures by all states, that a *more likely than not* position cannot be adequately documented and supported at this time. However, based on Company X's review of FIN 48, the draft FSP and discussions with its auditors, the liability to be recorded now is a calculation of the potential value assuming losing on <u>all</u> potentially asserted years (i.e., going back to the earliest potential nexus year for the subsidiary in question).

Proposed FSP FIN 48-a apparently would establish bright-line rules requiring that this potential liability (including assumed penalties and interest) be carried and increased until either State A asserts nexus and the issue is dealt with through an audit process or Company X voluntarily discloses its position to State A. It does not appear that under the terms of proposed FSP FIN 48-a an effective settlement could occur if no return were filed. We consider this result to be inconsistent with the principle of applying professional judgment to evaluate whether it is 51% or more likely that a tax position will be realized, but not being able to determine when it is probable that a liability for certain open years does not exist (i.e., has been effectively settled). Further, such a conclusion bears no resemblance to reality and the evolution of tax issues, which are ultimately settled, individually or as a group, with a taxing authority either through a negotiation process or through litigation. Indeed, a company may find itself in the absurd position of voluntarily disclosing its non-filing position to reduce this overstated liability and continuing earnings drain.

We recommend that the Board allow companies and their auditors to exercise professional judgment as to when liabilities have been effectively settled by allowing consideration of all relevant circumstances (such as the passing of time, number of open federal years, other states' practices, litigation by others, etc.) when determining the appropriate liability. We believe that imposing prescriptive rules would not advance the goal of representational faithfulness and transparency and, indeed, could have the opposite result.

In addition, a very straight forward question is raised that affects a CEO or CFO's ability to certify their financial statements under Sections 302, 404 and 906 of the Sarbanes-Oxley Act – how can they represent that the financials as being true and fair if there are liabilities recorded and reported that are far in excess of any probable exposure or settlement amount? Accordingly,

we encourage the Board to revisit its definition of, and considerations allowed, in determining when a liability has been effectively settled to ensure that the liabilities recorded bear resemblance to the true economic exposure of the matters at hand.

Again, we believe the issues surrounding FIN 48 are myriad, but we thank you for the opportunity to comment on this very important issue.

Sincerely,

Jane Windmeier

Chair, RILA Financial Leaders Council

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Chair, RILA Tax Advisory Committee