



August 8, 2008

Russell G. Golden  
Technical Director  
Financial Accounting Standards Board  
401 Merritt 7  
PO Box 5116  
Norwalk, CT 06856-5116

RE: File Reference No. 1600-100

Dear Mr. Golden:

The National Retail Federation (NRF) welcomes the opportunity to comment on the FASB's Exposure Draft, *Disclosure of Certain Loss Contingencies, an amendment of FASB Statements No. 5 and 141(R)* (the "ED"). NRF is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet, independent stores, chain restaurants, drug stores and grocery stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.6 million U.S. retail companies, more than 25 million employees – about one in five American workers – and 2007 sales of \$4.5 trillion.

The retail industry is a vocal and ardent supporter of transparent financial reporting. It is important to provide investors with disclosure related to loss contingencies so that they can make informed investment decisions. We have concerns, however, that the disclosures proposed in the ED require the disclosure of amounts and information that may be extremely speculative, unreliable and possibly misleading. We are also concerned that the ED would require companies to disclose information that could undermine their legal defenses and/or impair attorney-client privilege. We do not believe that the ED appropriately balances the benefits of achieving the disclosure objectives against the challenges to preparers, auditors, the legal community. It would also present a challenge to management in exercising their fiduciary responsibilities. The views expressed below represent the legal and financial executives at our member organizations.

- We question whether the new disclosure requirements are necessary for the protection of investors. Under current rules, companies are required to make provisions for loss contingencies so that the financial statements represent the issuers' best estimates of loss contingencies that are probable and can be reasonably estimated. To the extent that a loss contingency is probable but cannot be reasonably estimated, current rules require the issuer to make disclosure so that investors can understand the financial statements presented. Under SEC MD&A rules, as well as under the existing FAS 5, more specific disclosures of risks related to litigation are required if material, which covers situations that are expected to be of most interest to investors.

To go beyond what is currently required and mandate that issuers give both qualitative and quantitative disclosure of loss contingencies where the potential loss is material – even when the probability of loss has not been determined – not only serves as a roadmap to litigation by adverse litigants but is a disservice to the issuer's investors. The market price of an issuer's securities can be severely impacted by premature disclosure which may create expectations or fears that are highly unrealistic. Such disclosures merely benefit speculators in a company's securities to the detriment of long term investors.

- The assessment of the outcome of litigation can be very difficult to predict as it is subject to many factors, including those that are not within the control of the company and highly dependent on individual facts and circumstances. Litigation is subject to legal processes that are highly complex and attempting to quantify the loss exposure before resolution of several factors that are outside the control of the company will result in estimates that could be misleading to investors. Many of these highly uncertain factors are not well-suited for public disclosure. This is especially true for litigation which is in the early stages, or for unasserted claims. Additionally, the cost to make the types of estimates and disclosures proposed by the ED would be very high, both quantitatively and qualitatively, as considerable time will be spent through consultation with legal counsel and other experts.

Further, in cases where claims are made near the end of a reporting period it would be particularly difficult to comply with these proposed disclosure requirements. It may take several months or more to do a complete analysis of the underlying facts in order to form any kind of estimate of the possible exposure. It is also possible that less scrupulous individuals may file claims containing unreasonably high financial demands in an effort to force quick settlements lest the company be pressured to make unnecessarily misleading disclosures.

- Companies have a fiduciary responsibility to act in the best interests of their shareholders. In a situation where an adversary is attempting to extract compensation, a company must protect the confidentiality of information that can be used for the benefit of the adversary and harmful to the interests of the company. The requirement for a company to determine its maximum loss exposure in an adversarial situation in which the claimant has not quantified the amount of claim will result in the company providing an informational advantage to the claimant. Other information required to be disclosed, including the minimum disclosures required when a company applies the prejudicial information exemption, could still be prejudicial to a company's legal defenses.
- The proposed qualitative disclosure requirements could result in the disclosure of information that is covered by attorney work product and attorney-client privilege. Since the disclosures could be based on confidential communications between a company and their legal counsel we have concerns that such disclosure will result in the waivers of attorney-client privilege or work product immunity. In addition, the disclosure in and of itself could be evidence that is admissible against a company or could lead to altering the negotiations of a settlement.

We are also concerned that such disclosure would not be covered by the safe harbor for forward looking statements. Because of the evolving nature of litigation, it is reasonable to presume that changes to earlier estimates might be necessary. This could expose companies to additional litigation even if the changes to the disclosure were reasonable changes in estimates based on changes in circumstances.

- The ED could also impact external auditors' ability to audit the proposed disclosures. Auditors will certainly request from the company and its legal counsel information that appropriately supports the proposed disclosures. But revealing such information to the auditor in support of the disclosure could impair the company's legal defenses. We have also been advised that there is unease over how the ED will impact the "treaty" currently in place between auditors and the legal community.
- The business-to-consumer relationship that is retail exposes merchants to potentially more class action lawsuits, particularly frivolous lawsuits, than many other industries. The vast number of transactions and interactions occurring daily puts retailers at particular risk for legal claims. Thus, the requirements in the ED would be particularly burdensome to the retail industry and provide little benefit to an investor.

A recent retail issue commonly known as "FACTA" provides a great example of a situation where disclosure would have been detrimental to companies and their investors' understanding of the current financial picture. Under recent privacy legislation, retailers were directed to remove certain customer payment information from their receipts and faced stiff penalties for failure to comply. However, due to ambiguities in the law, a question arose as to whether it was permitted to print the card expiration date on the receipt. As a result, many retailers and restaurants faced claims of between \$100 and \$1,000 for every credit card receipt they issued that contained a card expiration date. Although the likelihood of an adverse judgment was small, potential exposure equaled or exceeded respective companies' market capitalization given the number of receipts that retailers issue. Aggregation would not have solved this problem, and disclosing the worst case scenario would have been extremely misleading. (Congress ultimately clarified the issue and the cases were dropped.) Under the current rules, disclosure of such a low probability event would be limited. Under the proposal, when there is a low probability of a high dollar case, hundreds of companies would be required to spend a great deal of time and money to provide voluminous disclosures that ultimately would not have significance.

In addition, we believe it would be very arduous for retail companies to comply with the aggregation and tabular reconciliation requirements. Much of the litigation that retailers face is operational and is tracked in various off-line systems. Disclosures requiring a company to aggregate such litigation matters and track the detailed movements in the litigation would result in a significant administrative burden.

- The proposed requirement to disclose contingencies that could have a severe impact on the company and are expected to be resolved within a year without regard to likelihood is problematic. This is a significant divergence from the

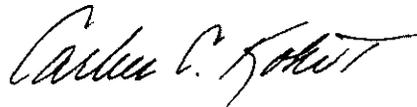
current principle-based standard which considers likelihood and the impact of the event, and we fail to see the benefit in this disclosure required by the ED.

- In addition to the onerous implications of this ED for our larger members, we are particularly concerned about the impact it would have on our smaller retailers. Because smaller companies often have only one or two lawsuits pending, the need for the prejudicial exemption will be much more common. Yet, the ED notes that circumstances under which the prejudicial information exemption will be used are expected to be "rare." We believe that such exemption is needed much more frequently than contemplated by the ED. Nonetheless, the required minimum disclosures, upon exercising the prejudicial exemption, still require the disclosure of information that is prejudicial and thus reduces the usefulness of the prejudicial information exception.

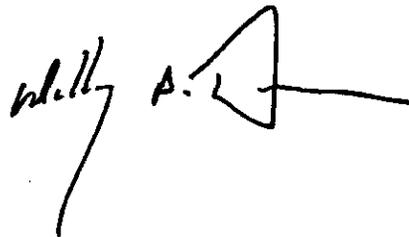
In conclusion, we believe that the existing standards of FASB Statement No. 5, *Accounting for Contingencies* and No. 141(R), *Business Combinations*, as supplemented by the AICPAs' Statement of Position ("SOP") 94-6, *Disclosure of Certain Significant Risks and Uncertainties* and SOP 96-1 *Environmental Remediation Liabilities* provide a well established principle-based framework for the accounting and disclosure of loss contingencies. If, however, the Board continues to believe that changes are needed to current practice, it should be done through improving existing practice or as a part of the convergence efforts with the International Accounting Standards Board.

The National Retail Federation thanks the Board for its consideration of our comments and suggestions and welcomes any further discussion on the topic.

Sincerely,



Carleen C. Kohut  
SVP and Chief Financial Officer



Mallory B. Duncan  
SVP and General Counsel