



1700 NORTH MOORE STREET
SUITE 2250
ARLINGTON, VA 22209
T (703) 841-2300 F (703) 841-1184
WWW.RILA.ORG

June 1, 2010

Internal Revenue Service
CC:PA:LPD:PR (Announcement 2010-9)
Room 5203
P.O. Box 7604
Ben Franklin Station, N.W.
Washington, DC 20044

Re: Comments on Announcements 2010-9, 2010-17, and 2010-30

The Retail Industry Leaders Association (“RILA”) is pleased to respond to the Internal Revenue Service’s (the “Service”) request for comments on Announcements 2010-9 (2010-7 I.R.B. 408), 2010-17 (2010-13 I.R.B. 515), and 2010-30 (2010-19 I.R.B. 668) (collectively, the “Announcements”).

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.

If implemented, the Announcements would require business taxpayers with total assets in excess of \$10 million to report so-called “uncertain tax positions” on a new schedule to be filed with their federal income tax returns. RILA has a significant interest in the development and implementation of this proposed reporting requirement. RILA is concerned that certain of the information required to be disclosed would hinder, rather than help, the Service in evaluating the relative importance of uncertain tax positions and correspondingly allocating its resources. Moreover, RILA’s members (many of whom participate in the Compliance Assurance Program (“CAP”)) already disclose a significant amount of information to the Service, and reporting uncertain tax positions separately and in a different format would impose an additional reporting burden that is largely redundant in light of such disclosures.

RILA appreciates the Service’s consideration of the detailed comments provided below. This letter addresses RILA’s primary concerns with the new reporting requirements in Section I, the questions posed in the Announcements in Section II, and RILA’s additional comments in Section III.

I. RILA’S PRIMARY CONCERNS

RILA has three primary concerns regarding the proposed reporting of uncertain tax positions. First, the reporting of a maximum tax adjustment (“MTA”) for *each* uncertain tax position moves significantly beyond the requirements of Financial Accounting Standards Board

(“FASB”) Interpretation No. 48 (“FIN 48”) disclosure, ignores the complex interrelationship and interdependence among tax positions, and could provide a misleading indication of the relative magnitude of a taxpayer’s various uncertain tax positions.

Second, taxpayers participating in CAP already disclose information on uncertain tax positions to the Service, and requiring such taxpayers to disclose again the same information in a different format would add to their administrative reporting burden without providing an additional benefit to the Service. Similarly, much of the information sought is already provided elsewhere in the return, such as on Schedule M-3 or on other disclosure forms and schedules. It is unclear why the Service would need or want such information again, simply in a different format, without taking corresponding actions to eliminate the forms and schedules that will then be duplicative.

Third, the proposed schedule for reporting uncertain tax positions (the “Schedule UTP”) creates significant uncertainty as to the level of detail required for a disclosure to be considered accurate and complete. This lack of clarity is unhelpful to both taxpayers and the Service, and RILA recommends that implementation of the schedule be delayed to resolve this and other issues.

A. Disclosure of Tax Adjustments

1. Maximum Tax Adjustment

The proposal to require disclosure of an MTA for *each* uncertain tax position is fundamentally inconsistent with FIN 48’s requirements and, thus, would entail significant additional analyses and work not currently required or reviewed in a company’s financial audit. Such a requirement would, therefore, be extremely burdensome for taxpayers.

An MTA for each uncertain tax position also would be a poor and potentially misleading metric for identifying and prioritizing issues for audit, and it would not provide the Service with better information upon which to allocate its resources. For example, the MTA for a large but conservative tax position may be larger than an MTA for a smaller, but more aggressive position. In addition, in virtually all cases the MTA will fail to approximate an actual tax adjustment because it ignores the interdependency between tax positions, including the effects of net operating losses and excess credits. Accordingly, the oversimplification built into the proposed MTA does not reflect the actual tax characteristics of a taxpayer and, therefore, provides limited and potentially misleading information.

For these reasons, RILA recommends that the requirement for assigning an MTA to each uncertain tax position be eliminated from the proposed reporting requirement.

2. Disclosure of Material Positions

If the Service determines that disclosure of the materiality of the uncertain tax positions is necessary, RILA recommends that the Service require taxpayers to report only uncertain tax positions that exceed a certain dollar threshold for materiality, but again without assigning an

MTA for each position. Although determining whether a position exceeds a certain dollar threshold would again suffer from the same lack of precision that is identified above, focusing only on potentially material issues would help ensure that the Service concentrates on uncertain tax positions that pose the greatest risk to the government while minimizing the burden on taxpayers.

3. Ranking of Uncertain Tax Positions

As a further alternative to disclosing only uncertain tax position above a materiality threshold, the Service should consider requiring taxpayers to rank their uncertain tax positions above the threshold. Such a ranking could be applied to the taxpayers' top three or five material uncertain positions, based on the taxpayer's estimate of the position's MTA. Or, the ranking could be of all material uncertain tax positions into check-the-box categories (e.g., high, medium, low MTA) based on levels established by the Service. In either case, taxpayers would not be required to disclose a separate MTA for each uncertain position for the reasons outlined above.

Ranking exceeds what is required under FIN 48 and still suffers from many of the same defects as providing a separate MTA for each uncertain position, but would be somewhat less burdensome for taxpayers. Ranking also would be consistent with the information sought by the Service – Chief Counsel Wilkins has publicly stated that the Service is “looking at the order of magnitude” rather than being concerned about having the right amount on the Schedule UTP. Jeremiah Coder, “Wilkins Discusses Need for Uncertain Tax Position Reporting,” *Tax Notes*, Mar. 3, 2010, at 2, 2010 TNT 41-2.

At the same time, RILA recommends that taxpayers *not* be required to rank transfer pricing and valuation positions. Taxpayers cannot accurately estimate the size, even on a relative basis, of such positions because any potential adjustment would depend on the as-yet-unknown valuation determination that may potentially be asserted by the Service. To address this issue at least in part, the draft instructions to Schedule UTP allow taxpayers to rank transfer pricing and valuation positions based on the amount of their reserves for each position. However, even this ranking is problematic due to the potential for dramatic differences of opinion between the Service and the taxpayer with respect to valuation.¹

4. Aggregate Maximum Adjustment

If the Service ultimately determines that reporting of uncertain tax position without assignment of MTAs is insufficient, RILA recommends that taxpayers be required to report only an aggregate MTA amount for all uncertain tax positions, and that the aggregate MTA contain only the amounts that comprise the FIN 48 disclosure. Indeed, after weighing the merits of requiring disclosure of a separate value for each uncertain tax position, FASB *rejected* disclosure of

¹ RILA notes that it is unclear from the Announcements or the proposed Schedule UTP what consequences would result in the case where a reserve made in a taxpayer's best judgment at the time of the disclosure on the schedule ultimately proves to bear little relation to the final outcome of the issue. See also Section III.E. *infra* regarding the enforcement of the proposed reporting requirement.

separate values and required only the disclosure of an aggregate amount. *See* FIN 48, Appendix B64 (“[T]he Board concluded that requiring disclosures at the aggregate level does not reveal information about individual tax positions yet it provides information that users indicated would be decision useful.”).

Moreover, this would be consistent with public statements by Commissioner Shulman and Chief Counsel Wilkins that the reporting of uncertain tax position should be consistent with the disclosures required under FIN 48. *See, e.g.*, Alison Bennett and Stephen Joyce, “Shulman Says IRS to Propose Filing on Uncertain Tax Positions; Practitioners Say Proposal Will Change Landscape of Disclosure,” 6 *Acct. Pol’y & Prac. Rep.* (BNA) No. 115, at 2 (Feb. 5, 2010) (“We tried to approach this without getting into the heads of taxpayers as to the strengths or weaknesses of their positions. We’re only asking for a list of issues that the taxpayer has already prepared for financial reporting purposes.”); Amy S. Elliott, “Williams Describes Uncertain Tax Positions Under New Requirements,” *Tax Notes*, Mar. 11, 2010, at 1, 2009 TNT 47-1 (reporting that, according to Mr. Wilkins, the Service “intends for the issues disclosed on the new schedule to piggyback on and be the building blocks of the accounting work that’s done for the financial reserves.”).

B. Exemption for Compliance Assurance Program Participants

Based on the experience of RILA members participating in CAP, RILA recommends that CAP taxpayers be exempt from reporting uncertain tax positions because they already provide this information. CAP taxpayers undergo a continuous examination by the Service and are required to disclose, and represent that they have disclosed, all material tax items, including positions reserved under FIN 48. Chief Counsel Wilkins has publicly acknowledged that the reporting of uncertain tax positions would “not be a big change” for CAP taxpayers. *Coder, supra*, at 2. Nevertheless, it would be an unnecessarily redundant one.

The high level of transparency that exists for CAP taxpayers has enabled them and the Service’s Examination Division to focus resources on the most significant areas of potential disagreement. This type of dialogue should be the priority rather than requiring CAP taxpayers to submit essentially the same information in a different format. If CAP taxpayers are not exempted entirely from the new reporting requirements, RILA recommends that the Service revise the information requested to be more consistent with the information that CAP taxpayers are already required to provide. In the same vein, RILA believes that both taxpayers and the Service would be best served if the new information required for all taxpayers on the Schedule UTP were reconciled with information that is already provided through existing disclosures, such as those required in Forms 8275 and 8886 as well as Schedule M-3, and duplicative forms and schedules were eliminated accordingly.

C. Issues with Proposed Schedule UTP

1. Optional Initial Implementation of the Schedule UTP

Even with the foregoing recommendations included, the proposed Schedule UTP will be a substantial new undertaking for taxpayers. Accordingly, RILA recommends that the filing of the proposed Schedule UTP be optional for at least the first year after it is released in final form.

Providing an initial optional implementation is supported by the recent precedent of the new Schedule H (“Hospitals”) to Form 990, which was released as an optional schedule in its first year because “[m]any organizations ... need[ed] additional time to make decisions and establish or modify reporting systems to complete the Schedule H for the first time,” as “[m]ost of the information requested in Schedule H [was] not required in the [prior] Form 990.”²

The same rationale applies here, as the proposed Schedule UTP is an unprecedented change in the reporting requirements applicable to business taxpayers, and an optional transition period is appropriate just as it was for Schedule H. In addition, the benefits, or lack thereof, of the Schedule UTP will not be evident for some time, and many issues may not be known until taxpayers have had an opportunity to complete the schedule under their own particular circumstances. An initially voluntary implementation period will provide an opportunity to identify unanticipated issues and unintended consequences and allow time to make necessary modifications to the new schedule.

At the same time, RILA urges the Service to assess its processes for issuing guidance, especially with respect to known areas of uncertainty, before implementing this requirement for disclosure of uncertain tax positions. Many of the issues that will ultimately appear on the proposed Schedule UTP will be items for which taxpayers are currently awaiting guidance.

If the Service proceeds with mandatory implementation of Schedule UTP, RILA recommends in the alternative that penalties be waived for at least the first year and that the Service solicit additional comments regarding the implementation of the schedule and the new reporting requirement during that period in order to identify and correct unanticipated issues and unintended consequences as discussed above.

2. Requirement for “Concise” Description of Positions

In addition to the timing for implementation, an area of particular concern with the proposed Schedule UTP is the level of detail required in the “concise” description of each uncertain tax position. As demonstrated by the examples in the draft instructions to the Schedule UTP, the level of detail sought is quite significant. Moreover, this level of detail appears to be contrary to the Service’s policy of restraint.

² Internal Revenue Service, “Form 990 Redesign for Tax Year 2008, Schedule H, Hospitals – Highlights” at 5-6 (Dec. 20, 2007), available at: http://www.irs.gov/pub/irs-tege/highlights_schedule_h.pdf.

As an alternative, RILA recommends that the Service consider, and obtain comments on, a check-the-box approach under which a taxpayer can objectively indicate whether specifically enumerated deductions, credits, etc. of concern to the Service are reflected on the taxpayer's return (such as a tiered issue), or whether the taxpayer has entered into a particular transaction (such as a listed transaction) that resulted in certain tax benefits. Such an approach would obviate the issue surrounding the "concise" description, and the information requested could be easily coordinated with disclosures already made on other returns and schedules in order to avoid duplication, as also noted above.

II. COMMENTS REQUESTED IN THE ANNOUNCEMENTS

The Announcements requested comments on a number of issues with respect to the proposed reporting requirement. This section provides RILA's comments on some of those issues to the extent that such issues are not elsewhere in this letter.

A. Whether Calculation of the MTA Should Relate to the Tax Period for which the Return is Filed or to All Periods

RILA recommends that any calculation of an MTA, or other indication of the relative importance of an uncertain tax position, relate only to the tax period for which the tax return is filed. We believe that the draft instructions appropriately provide that "A corporation is not required to report a tax position it has taken in a prior tax year if the corporation reported that tax position on a Schedule UTP filed with a prior year tax return." Reporting prior year amounts would add unnecessary complexity to the compliance and examination process. Further, a reserve for a prior year is usually established when the Service raises an issue on examination. If the Service is already aware of the uncertain tax position, then disclosure would be unnecessary. Hence, RILA also supports the draft instructions' statement: "The initial recording of a reserve will trigger reporting of a tax position, but subsequent reserve increases or decreases with respect to a tax position taken in a tax return will not."

B. Application of the Related Entity Rules

The proposed disclosure requirement should cover only the taxpayer and those entities that are members of the taxpayer's consolidated group and that are included in its federal income tax return. Inclusion of other related entities would complicate the reporting of uncertain tax positions and significantly increase the administrative burden on taxpayers with business operations and reporting systems that are not prepared to deal with tracking the tax effects from such entities.

C. Whether the Scope of the Announcement should be Modified Regarding the Uncertain Tax Positions for which Information is Required to be Reported

1. Exclusion of Timing Issues

RILA recommends that temporary uncertain tax positions relating to timing issues be excluded from disclosure. Because the overall effect of these positions is temporary, the MTA concept is ill-suited to capture the relative priority of such positions.

Moreover, to the extent that such disparities are the result of book-tax differences, these positions are already reflected on Schedule M-3, and as noted broadly above, requiring the disclosure on the proposed Schedule UTP would be duplicative and unnecessary. Alternatively, taxpayers should be permitted to satisfy the requirement to disclose book-tax differences on their Schedule UTP simply by cross referencing the disclosure of such positions on their Schedule M-3.

2. Positions Where No Reserve is Made

The Announcements propose to require disclosure of positions where no reserve is made because the taxpayer intends to litigate the issue. Again, this disclosure would go beyond a taxpayer's FIN 48 disclosures. In addition, the standard proposed in the Schedule UTP focuses on the likelihood of settlement rather than the probability that a position will be sustained on examination. A disclosure standard based on the Service's unknown willingness to settle an issue creates significant uncertainty for taxpayers, and RILA recommends that the Service adopt the FIN 48 recognition standard, which focuses solely on the likelihood of a taxpayer prevailing on a particular issue (again in the context of our view that MTA disclosure should not be required, or alternatively that only the aggregate amount be disclosed). Furthermore, the Service should unequivocally confirm that it will not seek the rationale behind the disclosure of positions involving an intention to litigate because such information would provide insight into a taxpayer's strategic assessment of potential litigation and would be inconsistent with the spirit of the Service's policy of restraint.

Equally problematic is the proposal to require disclosure of uncertain tax positions for which no tax reserve has been established because the taxpayer has determined that the Service has a general administrative practice not to examine the position. It is unclear how taxpayers will identify such positions when the Service has not provided any guidance on what issues would fall into this category. Accordingly, RILA recommends that such positions be eliminated from the Schedule UTP disclosure requirement. If, however, such positions are required to be disclosed, RILA urges the Service to publish a notice periodically that enumerates the areas where it has an administrative practice of not challenging tax positions. RILA also recommends that the initial notice regarding administrative practices be published prior to implementation of the Schedule UTP.

D. Types of Uncertain Tax Positions to be Reported by Pass-Through Entities

Treatment of pass-through entities is a significant issue for RILA's members because many retailers operate through partnerships, limited liability companies (LLCs), and S corporations. The instructions to the proposed Schedule UTP refer only to "corporations," and Chief Counsel Wilkins has publicly stated that pass-through entities "generally" will not be subject to the new reporting requirements except to the extent that a "reserve was taken in response to uncertainty as to the appropriate status of the entity as a pass-through [entity]." Coder, *supra*, at 2. RILA strongly agrees with this approach, and urges the Service to clarify the draft instructions to the Schedule UTP accordingly.

III. ADDITIONAL COMMENTS

A. Accounting Method Change

RILA is concerned that the proposed disclosure of an uncertain tax position should not influence a taxpayer's ability to make an accounting-method change concerning that position. RILA recommends that the Service confirm that a disclosure of an uncertain tax position will not create a negative presumption with respect to a taxpayer's application for a change from one valid accounting method to another valid method.

B. Implementation of the Proposed Reporting Requirements

The proposed reporting requirement raises serious concerns regarding its use by the Service's field representatives. RILA urges the Service to provide adequate training to the field in order for any new reporting requirements to be implemented properly and appropriately. This issue is even more acute if the Service ultimately requires disclosure of more than the aggregate MTA. In that situation, the Service should issue guidance to the field that clearly delineates the permissible, and impermissible, uses of the information disclosed on the Schedule UTP. For example, if individual MTAs are required for each uncertain tax position, it would be inappropriate for a proposed adjustment simply to incorporate the MTA without an independent analysis reaching the same amount. The MTA should be used only to identify potential issues, not income tax adjustments. RILA shares other taxpayers' concern that the proposed disclosures could be viewed in the field as a road map for taxpayer audits and strongly urges the Service to avoid that outcome through clear guidance to the field issue contemporaneous with the implementation of the proposed Schedule UTP.

C. Foreign and State Tax Authorities

RILA is concerned that information on uncertain tax positions could be shared with foreign tax authorities, for example, under tax treaties and Tax Information Exchange Agreements ("TIEAs"). The Service should confirm that it will not share taxpayer-specific information disclosed under the proposed reporting requirements with foreign tax authorities, except in strict compliance with an applicable tax treaty or TIEA. In this regard, RILA notes that Chief Counsel

Wilkins has publicly stated that information received under the proposed reporting requirements will be subject to the treaty or TIEA and not automatically shared. *See Coder, supra*, at 2.

Similar concerns arise with respect to the availability of information on uncertain tax positions to state tax authorities. RILA does not believe such information should be shared with the states and urges the Service to clearly indicate the circumstances in which such information would be made available to state tax authorities.

D. Effect of SEC's Adoption of IFRS Accounting Standards

On February 24, 2010, the Securities and Exchange Commission (SEC) approved a statement on global accounting standards, indicating its continued support for the convergence of U.S. Generally Accepted Accounting Principles (GAAP) and International Financial Reporting Standards ("IFRS").³ The statement notes that the SEC will decide whether to incorporate IFRS into the U.S. financial reporting system in 2011, with companies expected to transition to the new reporting regime by no earlier than 2015.

If the SEC proceeds with this effort, it will have a fundamental impact on FIN 48 – the basis for the proposed reporting requirement of uncertain tax positions. Given the potential for the Service to implement the proposed reporting requirement only to have to restructure it fundamentally for IFRS reporting standards, RILA recommends that the Service delay implementation of the proposed Schedule UTP, at least until the SEC makes its determination next year, in order to gain clarity on the future financial reporting requirements. If the Service determines that the proposed reporting requirements apply to taxpayers subject to both GAAP and IFRS standards, then the Service should remedy the disparate reporting burdens that would be placed on taxpayers, including those resulting from anticipated rules for companies to transition from GAAP to IFRS.

E. Enforcement of the Proposed Reporting Requirement

The Announcements, the proposed Schedule UTP, and draft instructions create a number of ambiguities that significantly complicate taxpayers' ability to comply with the new reporting requirement. For example, as noted above, the parameters of what constitutes a "concise" description are unclear. Similarly, there is uncertainty surrounding the determination of which sections of the Internal Revenue Code to disclose under Column B ("Primary IRC sections") in Parts I and II of the proposed Schedule UTP, particularly where a tax position relates to more than three primary Code sections. More broadly, taxpayers have no certainty as to what constitutes sufficiency of disclosure on the Schedule UTP for it to be considered accurate and complete, nor is there any indication as to the penalties that the Service will impose on insufficient disclosure.

³ Securities and Exchange Commission, "Commission Statement in Support of Convergence and Global Accounting Standards," Release Nos. 33-9109, 34-61578 (Feb. 24, 2010), available at: <http://www.sec.gov/rules/other/2010/33-9109.pdf>.

As a result, such ambiguities may force taxpayers to treat the Schedule UTP as an uncertain tax position in and of itself. Additionally, without guidance as to the potential penalties, taxpayers would have no basis for determining an MTA for the Schedule UTP, should the Service determine that the magnitude of uncertain positions, either individually or in the aggregate, must be disclosed.

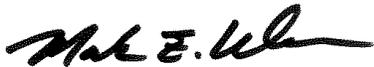
To address these uncertainties, RILA recommends that the Service provide guidance to clarify the ambiguities outlined above. In addition, RILA recommends that the Service clearly delineate the penalties that apply under current law to the new reporting requirement. Lastly, RILA urges the Service to establish a safe harbor or exception to any applicable penalties for good faith compliance with respect to Schedule UTP, especially in light of the foregoing uncertainties.

Concluding remarks

RILA appreciates the opportunity to comment on the new reporting requirements proposed in the Announcements. RILA recognizes that the reporting of uncertain tax positions has the potential to increase transparency and improve tax administration, at least with respect to those taxpayers that are not already required to disclose such positions. However, RILA urges the Service to consider the issues outlined in this letter before implementing any new reporting requirement to ensure that it minimizes the compliance burdens on taxpayers.

We would be pleased to discuss RILA's views with you further at your convenience.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mark E. Warren". The signature is fluid and cursive, with a long horizontal stroke at the end.

Mark E. Warren

Vice President, Tax & Finance