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Date: August 8, 2008

Via E-mail director@fasb.org



LETTER OF COMMENT NO. 146

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

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

Dear Director:

Eli Lilly and Company appreciates the opportunity to comment on the Financial Accounting Standards Board's (FASB's) Proposed Statement of Financial Accounting Standards, Disclosure of Certain Loss Contingencies, an amendment of FASB Statements No. 5 and 141 (R) (the "Proposed Statement"). Eli Lilly is a large, multinational company that creates and delivers innovative medicines that enable people to live longer, healthier, more active lives.

We support the FASB's efforts to provide meaningful financial reporting to readers of financial statements and the need to review accounting literature given the changing business, legal and regulatory conditions, as well as investor needs and concerns. However, we strongly disagree that increased disclosures regarding contingencies will further that mission. FASB Statement No. 5 is a good example of principles-based accounting that has been in place for over 30 years.

In our response we have only addressed the most crucial issues in the Proposed Statement. We strongly agree with the concerns expressed in the letters from the Financial Executives International, the Society of Corporate Secretaries and Governance Professionals, and the letter by the senior litigators from six leading pharmaceutical companies. We have chosen to not repeat many of the discussion items in their letters; however, we strongly support and agree with their letters.

#### **Exemption from Disclosing Prejudicial Information**

Our primary concern with the Proposed Statement relates to loss contingencies associated with litigation. In this litigious environment, companies are faced with many claims seeking amounts that are ultimately either dismissed in court or settled for substantially less than the plaintiff demands in their claims. Plaintiffs make these claims for a multitude of reasons including publicity, negotiating leverage, and political and social agendas.

Even though the Board has stated that it does not intend that any revision in the Proposed Statement would require disclosures that are prejudicial to the interest of the financial statement preparer, we believe that any incremental disclosures regarding litigation mentioned below, even if they are aggregated, would only prove useful to a plaintiff and would therefore be prejudicial. Moreover, aggregation of potential losses that could have the most risk to a company are not likely to limit the prejudicial information as the cases may be of a different nature and may not be aggregated or the company may only have one type of litigation occurring and any expanded disclosures would only be for that particular litigation. Thus we believe that all additional disclosures per the Proposed Statement could be prejudicial.

## Disclosures

### Disclosures Regardless of Likelihood

The requirement to disclose all loss contingences regardless of likelihood of loss that could have a severe impact would only distort the potential financial impact of an entity with "pie in the sky" dollar claims and lead to confusion for the reader. For example a company receives a claim for \$10 billion related to the use of their product. A settlement of \$10 billion would have a severe impact on the company. However, our legal counsel assures us that the likelihood of a loss is remote. Per the proposed requirements we must now disclose this claim even though we believe it to be remote, because it could have a severe impact if settled for that amount. We would then feel compelled to provide what would likely be a lengthy discussion of why the company does not feel that a loss is likely. This disclosure would require considerable additional work from our attorneys to ensure our disclosure would not contain any prejudicial information and would eventually lead to increased litigation costs overall to comply with the Proposed Statement.

### Quantitative Disclosures

The new disclosure requirement to provide quantitative information related to the amount of the claim or assessment or to provide a best estimate if no claim or assessment amount has been stated by the plaintiff is of particular concern.

We have had numerous suits filed against us claiming ludicrous amounts which are then ultimately settled for much less. For example, a plaintiff filed a claim against us demanding restitution of \$290 million, which ultimately resulted in a settlement of \$15 million (5% of the amount demanded). In another case the plaintiff filed a claim against us for \$100 million. The case was dismissed with no payment to the plaintiff for settlement.

Including the disclosures from the above examples detailing the amount of the claimant's demands is not helpful and potentially a dangerous approach. We believe that if these types of disclosures are approved then plaintiffs will only be encouraged to make claims for even larger and more irrational amounts potentially trying to force negotiations with the company to avoid the disclosure obligations. Thereby, we would be disclosing irrelevant information and potentially causing undue stress in the investor community.

Disclosing the possible range of loss which includes an estimate of maximum exposure, or disclosing the most likely outcome particularly when a plaintiff has not alleged a claim amount in the suit would only damage an entity's ability to negotiate a settlement or pursue available defenses. This is in effect doing the work of the plaintiff and in doing so may become a self-fulfilling prophecy dictating the result of the suit before the complete judicial process can take place. In addition, for the newest claims it is extremely difficult and costly to provide any estimate until the legal proceedings progress to a point that the counsel can deem a claim to be probable and the loss could be reasonably estimated.

Again, such disclosures would require advice of counsel which could be highly prejudicial. The prejudicial nature of obtaining counsels' advice is that their analyses could then be considered discoverable as auditors would need to review accordingly which would significantly harm the attorney/client privilege. Moreover, highly uncertain quantitative estimates are likely to harm a company's ability to defend against litigation and contribute to stock price volatility and potentially stock price depression and harm investors. To change the current disclosure approach would improperly place the decisions for required reporting into the hands of the defendant company's adversaries, rather than in the hands of its own Board and management.

### Qualitative Disclosures

The proposed requirements related to disclosing the most likely outcome and factors that would affect the outcome and timing of resolution would again only damage an entity's ability to negotiate a settlement or pursue available defenses. Inherently, litigation strategy will be compromised by this expanded qualitative disclosure. The requirement will put a company at risk for plaintiffs' attorneys' to potentially determine strategies employed by a company with respect to settlement discussions. In addition, the disclosure would require the advice of counsel

(increase litigation cost to the company) and could be highly prejudicial. The prejudicial nature of obtaining counsels' advice is that their analyses could then be considered discoverable as auditors would need to review accordingly which could risk the waiver of the company's attorney/client privileges. We specifically, agree with the position of FASB to not require disclosure of settlement offers, as doing so would compromise litigation strategy, as settlement offers expire quickly and many times do not reflect the status of negotiations later.

Specifically, litigation in the pharmaceutical industry typically involves intellectual property and product liability issues. The outcome regarding these types of suits are very difficult to predict particularly in markets that do not yet have meaningful judicial or administrative precedents upon which a company and its counsel can predict with reasonable accuracy. Accurate disclosures on complex issues are very technical and best understood by those closest to the situation or by trained attorneys.

Finally, the size of our current contingency and litigation disclosures per the current disclosure requirements in our annual report is approximately 20% of our 50 pages related to our financial activities. The volume of disclosure that the proposed rule would require could bury readers of the financial statements in unimportant information and obscure disclosures of the most meaningful information. More disclosure does not necessarily mean better disclosure.

#### **Tabular Reconciliation of Recognized Loss Contingencies**

Interim reporting of the reconciliation is inconsistent with the basis of condensed information reported at interim. Specifically, disclosures for loss contingencies regarding litigation do not change frequently as litigation can be a very long process covering many years. To gather this data quarterly would only prove costly to the company with very limited benefit to the readers of the financial statements. In addition, requiring quarterly updates could make it more likely that the disclosures would contain the prejudicial information as it would be more likely for readers/lawyers to be able to determine the specific case in which the reserves were adjusted. Annual requirement for the tabular reconciliation would provide more ability for companies to aggregate the year's activities and be less likely (although it is still concerning for many companies) to result in disclosure of prejudicial information.

#### **Effective Date**

We believe that the effective date in the Exposure Draft is not achievable if the final standard is issued as proposed in late third quarter or fourth quarter of 2008. It is unreasonable to expect those who report on a calendar year basis to fully implement expanded disclosures which will require significant work from outside counsel in such a short timeframe. We strongly recommend that adoption should begin with annual financial statements issued for fiscal years ending after December 15, 2009.

Since we did not address every issue presented in the Proposed Statement in our response, we would like to again state that we strongly agree with the concerns expressed in the letters from the Financial Executives International, the Society of Corporate Secretaries and Governance Professionals, and the letter by senior litigators from the six leading pharmaceutical companies.

In closing, we strongly believe the current required disclosures related to litigation loss contingencies are adequate for the readers of financial statements and appropriately balance the needs of the investors to have some understanding of the potential for loss and the needs of the companies to keep confidential information that could be prejudicial and cause harm to the companies and their investors. Any change in disclosures would only bring more cost in terms of gathering the data to be disclosed by attorneys, lost opportunity in litigation strategy to the company, and less shareholder return for the investor.

We appreciate the opportunity to express our views and concerns regarding the Proposed Statement. If you have any questions regarding our response, or would like to discuss our comments further, please call me at (317) 276-2024.

Sincerely,

ELI LILLY AND COMPANY

S/Arnold Hanish  
Executive Director, Finance, and Chief Accounting Officer