



LETTER OF COMMENT NO. 54

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August 7, 2008

Mr. Russell G. Golden
Technical Director
Financial Accounting Standards Board
File Reference No 1600-100
401 Merritt 7
Norwalk, CT 06856-5116

Subject: 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 Mr. Golden:

On behalf of the National Association of Manufacturers (NAM), I am pleased to submit the following comments to the Financial Accounting Standard Board (FASB) June 5, 2008 exposure draft of a proposed Statement of financial Accounting Standards, *Disclosure of Certain Loss Contingencies, an amendment of FASB statements No. 5 and 141(R)*.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Headquartered in Washington, D.C., the NAM has ten additional offices across the country. The NAM's mission is to enhance the competitiveness of manufacturers and to improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth, and to increase understanding among policymakers, the media and the public about the importance of manufacturing to America's economic strength.

NAM members support FASB's efforts to improve financial reporting and facilitate the convergence of U.S. Generally Accepted Accounting Principles (USGAAP) and International Financial Reporting Standards (IFRS). At the same time, we are extremely concerned that the proposed changes to Statement 5, if finalized, would have a negative impact on companies and would not improve the quality of financial reporting.

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Specifically, the NAM does not believe that FASB should proceed with its proposed disclosure standard relating to loss contingencies at this time. We believe that the proposed standard would lead to less accurate and less useful information for investors, threaten the attorney-client privilege and the attorney work product doctrine, unnecessarily provide information to potential claimants, and force corporate defendants to disclose privileged information to plaintiffs thereby jeopardizing their ability to defend the litigation. The current FAS 5 and SOP 94-6 disclosure requirements work well and members generally do not see the urgency to change them.

Instead, we believe that FASB should work with the International Accounting Standards Board (IASB) to develop a single, truly converged and international accounting and disclosure standard relating to loss contingencies. This approach would not put U.S. companies at a competitive disadvantage with foreign companies and foreign companies using IFRS would not be required to provide the broader, speculative disclosures proposed by FASB. In addition, this approach would give FASB and IASB the opportunity to identify and evaluate and, if necessary, correct the perceived inadequacies of current disclosures and possible solutions.

NAM members also believe that the proposed effective date of December 31, 2008, for calendar year-end companies is not practical.

For these reasons, the NAM urges FASB to defer finalizing this proposed Statement and instead work toward a new FAS 5R standard relating to the accounting and disclosure for contingencies that would be the same as a new IAS 37R standard.

More detailed comments are included in an attachment to this letter.

Thank you in advance for considering our request. If you should have any questions, please do not hesitate to contact me.

Sincerely,



Dorothy Coleman
Vice President
Tax and Domestic Economic Policy

Attachment

"NAM Comments on 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)"

THE PROPOSED AMENDMENT WILL LEAD TO MISLEADING AND LESS ACCURATE INFORMATION FOR INVESTORS.

Under the proposed standard, companies would be forced to estimate exposures before they have sufficient information to make an accurate assessment. In some cases, the proposal would even require companies to disclose contingencies that are considered to be remote. If companies are required to value claims at their early stages, the amounts would, by definition, be inaccurate because complex litigation generally cannot be accurately valued until after discovery is complete, at the earliest, IF EVER. If companies are required to provide their own estimates of the maximum possible loss when the plaintiff has not stated a claim amount, these estimates would then be difficult to calculate and in most cases, inaccurate.

The NAM believes that companies should not be required to disclose contingencies that are considered to be remote no matter how large a claim the plaintiff makes. Moreover, requiring disclosure of the claimed amount or requiring management to estimate a maximum loss exposure, would invite lawsuits seeking significantly higher damages. Plaintiffs would "leverage" the disclosure requirement by a defendant company as a means of forcing larger damage settlements. Additionally, reliance by investors on these numbers, which are inherently unpredictable, could become the source of additional litigation in the future.

For reasonably possible contingencies, FAS 5 requires disclosure of an estimate of the possible loss or range of loss or **a statement that such estimate cannot be made** (paragraph 10). IAS 37 similarly requires a disclosure of the financial effects of contingent liabilities **when practicable** (paragraph 86). Neither standard requires disclosure of remote contingencies. Thus, both USGAAP and IFRS are consistent in that they do not require disclosure of remote contingencies and they do not require quantification of loss contingencies if such an estimate cannot be made or is impracticable to do so. We do not believe that it makes sense to change USGAAP in a way that diverges even further from IFRS and establishes new disclosure standards that are not required by IFRS. In contrast, the real issue is related to the accounting for contingencies that, once addressed, would naturally address many of the current disclosure concerns.

THE PROPOSED AMENDMENT WILL NEGATIVELY IMPACT CORPORATE DEFENDANTS IN PENDING OR THREATENED LITIGATION AND PUT THEM IN A NO-WIN SITUATION

If companies are required to make qualitative assessments at the outset of litigation, adversaries will become privy to how a company values a claim. This would, in effect, become the minimum settlement value, leaving the company with little negotiating leverage. The required qualitative disclosures throughout the course of a claim inevitably will reveal a company's legal analysis and strategy for dealing with that claim. The contemplated disclosures could become admissible evidence, which could directly impact the course of an action. Further, the proposed

aggregation solution, only allowable in “rare instances,” does not provide sufficient protection for defendants.

Finally, to the extent the contingent liability involves claimants not yet identified, the disclosures may have the effect of encouraging claimants who might not otherwise have pursued a claim.

The contemplated disclosures necessarily would require input from in-house and/or outside counsel. Those disclosures could constitute public disclosure, and therefore a waiver, of the attorney-client privilege and/or work product protection. Apart from the disclosures themselves, independent audits, which would likely include underlying communications with counsel, may constitute a waiver of the attorney-client privilege and/or the work product doctrine.

IN SUMMARY:

The proposed amendments would force corporate defendants to:

- Make estimates about cases before they are accurately estimable, meaning that even best efforts could put companies in a situation where they provide information that is later proven inaccurate and thus subjects them to potential liability; and
- Publicly disclose qualitative and quantitative data about a case, which necessarily discloses a company’s thinking and strategy for dealing with a matter, while their adversaries are under no such obligation. This requirement would put defendants at a strategic disadvantage and potentially impact the defendant’s underlying liability.

The NAM does not see the offsetting benefits to investors of expanding the disclosures as proposed in the exposure draft. In contrast, the proposal would increase:

- The likelihood of inaccurate misleading information;
- The cost of preparing the proposed information;
- The potential direct impact of the disclosures on underlying liability;
- The potential of unsupported higher claims by plaintiffs;
- The potential of unintended waiver of the attorney-client privilege and attorney work product impact; and
- Pressure on corporate defendants to conservatively report or otherwise attempt to provide the information being sought in a way that preserves the ability to defend litigation in the best interests of shareholders.

In addition, if the FASB did implement the proposal without the IASB implementing a similar standard, U. S. companies would be at a distinct disadvantage from a global perspective because non-U.S. companies would not be required to provide these disclosures, even while raising funds in the U.S. securities markets.

USGAAP AND IFRS CONVERGENCE

Paragraph A31 of the proposal essentially states that the disclosure requirements of IAS 37 and those proposed are similar and that a *potential* convergence opportunity will exist when the IASB evaluates the disclosure requirements in this proposed Statement as part of its

reconsideration of IAS 37's disclosure requirements. Based on a comparison of the disclosure requirements of IAS 37 and those of this proposal, we believe that the proposal, if implemented, would create more divergence for an unknown timeframe. With the movement toward IFRS in the United States, we believe any new accounting standard, especially one with the significance of contingencies, should be the same between USGAAP and IFRS.

Moreover, it appears that the primary difference between USGAAP and IFRS is in the accounting rules rather than the disclosures. Concurrent with accounting convergence, we believe the disclosures for loss contingencies will logically follow and will necessarily be consistent with the accounting model. It does not make sense to move forward with new disclosures that may not be consistent with the future accounting model – requiring a second adoption in a year or two.

Following is a brief summary of the recognition and disclosure requirements of USGAAP versus IFRS:

Recognition:

Both USGAAP and IFRS require a company to recognize a contingency when it is probable that an obligation has been incurred. However, the definitions of *probable* are different. IFRS defines probable as *more likely than not*, or about 50%. In contrast, USGAAP defines probable as *likely to occur*, which historically has been interpreted to require a higher level of probability than *more likely than not*, or about 75%.

This difference should be resolved first, before the disclosures are converged. The NAM believes this would go a long way to satisfying many of the critics. There are also other differences (e.g., measurement) that also can be addressed successfully.

Disclosures:

Both USGAAP and IFRS require similar disclosures related to probable (i.e., recognized) contingencies and to other contingencies that are not remote. Specifically, the disclosures both generally require:

- A brief description of the nature of the obligation and expected amount and timing of outflows (aggregation of similar matters, into classes, is allowed);
- An indication of the uncertainties about the amount or timing of those outflows; and
- Expected or possible reimbursement.

Also, neither USGAAP or IFRS require disclosure of remote contingencies or quantification of contingencies if it is not practicable to do or a reasonable estimate cannot be made. The NAM members do not see an urgent need to make significant disclosure changes at this time.

IFRS currently does require a reconciliation of recognized liabilities (by class) from the beginning to the end of the most recent period while USGAAP does not have this requirement.

Although the proposal would largely converge the disclosures in this area, we do not believe the reconciliation should be required until jointly reaffirmed by the FASB and IASB.

RECOMMENDATION

Therefore, we propose the FASB adopt the following approach:

1. Converge with IAS 37:

Defer consideration of new, separate disclosure requirements as a separate initiative. Instead, have the FASB and IASB continue with a joint effort to conform the accounting and disclosures for contingencies between USGAAP and IFRS as one project.

- Defer adopting IAS 37's disclosure requirement of the tabular reconciliation of recorded contingent liabilities until it is confirmed by the FASB and IASB that such disclosures will be part of the new single USGAAP and IFRS standard.
- Defer making other disclosure changes at this time. IAS 37 currently has principled-based disclosure requirements that effectively combine the current principles of FAS 5 and SOP 94-6. Any new disclosures should be consistent with and not incremental to IFRS. Thus, companies should not be required to disclose remote contingencies, and quantification should not be required when an estimate of the financial effect is not practicable.

2. Provide adequate time for analysis and field testing:

- Better identify the perceived problems by assessing user needs and providing greater assurance that the proposed solution will solve the problems.
- Develop well-thought out disclosure guidance consistent with underlying accounting requirements balanced with cost-benefit analysis.
- Provide time for preparers to evaluate processes and controls and assess changes necessary to comply with any new requirements.

In addition, NAM members believe strongly that the proposed effective date of calendar year-end is not practical under any approach.