

Donald G. DeBuck
Vice President and Chief Financial Officer

August 5, 2008



LETTER OF COMMENT NO. 68

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, Exposure Draft of Proposed Statement of Financial Accounting Standards, "Disclosure of Certain Loss Contingencies, an amendment of FASB Statements No. 5 and 141(R)" (the "Proposed Standard")

**FILED ELECTRONICALLY (director@fasb.org) AND
SENT VIA U.S. Mail**

Dear Mr. Golden:

We appreciate the opportunity to comment on the Financial Accounting Standards Board's ("FASB" or "the Board") Exposure Draft of a Proposed Statement of Financial Accounting Standards, "Disclosure of Loss Contingencies, an amendment of FASB Statement No. 5 and 141(R)" (the "Proposed Standard"). This letter summarizes our views and concerns regarding this Proposed Standard.

We are gravely concerned with the proposed disclosure requirements concerning loss contingencies under the Proposed Standard. Our overriding concern is that the Proposed Standard will not improve disclosure. In fact, we believe it will result in fairly voluminous cumbersome disclosures which, at best, are difficult to understand if not confusing and, in the worst case, may be entirely misleading. However, there are a number of significant adverse unintended consequences which we believe are all but certain to result. Our principal concerns are summarized in the following paragraphs and described more completely in Exhibit I.

- **The disclosure required under the Proposed Standard will not be meaningful.** The exposure for many of the matters which are the subject of loss contingencies is inherently difficult to estimate with any meaningful precision. Similarly, it is equally difficult to assess the outcome of these matters with any degree of reliability. Claims and litigation are quite difficult to quantify and evaluate in this manner, particularly unasserted claims which by their nature lack clarity and definition. This would be especially difficult for any claims for which the likelihood of incurring a loss is considered remote (as would be required in the event a loss contingency is expected to be resolved within the near term and could have a severe impact on financial position,

cash flows or results of operations). We, therefore, believe this would make compliance with the proposed disclosure requirements wholly problematic. Moreover, we believe resulting disclosures would be confusing if not entirely misleading.

- **The disclosures required under the proposed Standard would be seriously prejudicial to a company's ongoing defense of underlying claims or litigation.** In many cases the amount of the underlying claim may not be known. Obviously, this will always be the case for unasserted claims. In these situations the Proposed Standard would require disclosure of a company's assessment of the maximum potential exposure. In most cases, the amount of the claim or maximum potential exposure will be a significant multiple of the most likely outcome or range of outcomes since companies are likely to be conservative in making such judgments and to use a worst case scenario approach. Disclosure of the maximum potential exposure or range of exposure would be seriously prejudicial to a company's ability to litigate or settle the underlying claims or litigation which is the subject of these disclosures. Moreover, disclosure of a company's qualitative assessment of the most likely outcome, the anticipated timing of the settlement or resolution of the claim or litigation, and significant assumptions in estimating potential exposure would likewise seriously compromise the company's litigation strategy and ability to settle any claim.
- **The disclosure requirement under the Proposed Standard would undermine attorney-client privilege and the work product doctrine.** The Proposed Standard requires disclosures of significant confidential information which would ordinarily be provided by counsel. Disclosing this information, especially in a public document such as an annual report, seriously jeopardizes attorney-client privilege and could constitute waiver. Any loss of privilege provided by the attorney work product doctrine on information prepared by in-house counsel in anticipation of litigation would be particularly damaging.
- **The exemption from disclosing prejudicial information is inherently problematic and would fail to protect a company's interests.** Although the exemption permits aggregation of disclosures regarding contingencies, in many situations a company may have only a single matter of any significance. In these situations aggregation would not protect the company's interests. In addition, it would be quite difficult to meet the qualitative disclosure requirements for aggregated multiple claims in any meaningful manner. The second step exemption allowed under the Proposed Standard would not adequately protect the company since it would nonetheless be required to "disclose the amount... a description of the loss contingency, including how it arose, its legal or contractual basis, its current status, the anticipated timing of its resolution" and "a description of the factors that are likely to affect the ultimate outcome of the contingency along with the potential impact on the outcome." Moreover, situations in which disclosure under paragraph 7 could compromise a company's legal position would not be "rare instances" but, in fact, quite common, if not universal.
- **The disclosure requirements under the proposed Standard are likely to precipitate litigation and potential losses for a company.** In view of the difficulty in quantifying

and evaluating exposures due to inherent uncertainty and range of variables affecting both the quantitative and qualitative disclosures (as discussed above), a company may face significant litigation in situations in which the ultimate outcome is significantly different than previous disclosures, despite its best efforts to satisfy disclosure requirements.

- **The disclosures will be extremely burdensome, time consuming, painstaking, and costly** and will require significant involvement of a company's outside counsel and auditors due to the complexity of the legal factors, uncertainty and potential exposure to the company, its counsel and auditors.
- **In the event the Board decides to move forward with the Proposed Standard (as exposed or as subsequently modified), we believe the transition will require at least one year from publication of the standard.** This would allow sufficient time for the audit and legal profession to align their respective professional standards (audit: Statement on Auditing Standards No. 12, "Inquiry of Client's Lawyer Concerning Litigation, Claims and Assessments"; legal: Statement of Policy Regarding Lawyer's Responses to Auditor's Request for information") to support these disclosure requirements.

We have included our responses to the questions the Board has specifically requested comment in the attached Appendix. Our responses also provide further information regarding our serious concerns with the Proposed Standard.

I would like to thank you for the opportunity to express our views in this letter. If you have any questions regarding our comments, please feel free to contact me at (310) 615-1686. I would be happy to meet with the Board at your convenience to provide further information regarding our concerns and suggestions, or participate in the Board's planned roundtable discussion.

Sincerely,

Donald G. DeBuck

cc: Mr. Robert H. Herz, Chairman and
Members of the Financial Accounting Standards Board
Mr. Christopher Cox, SEC Chairman
Mr. Luis A. Aguilar, SEC Commissioner
Ms. Kathleen L. Casey, SEC Commissioner
Mr. Troy A. Paredes, SEC Commissioner
Ms. Elisse B. Walter, SEC Commissioner

Attachment

EXHIBIT I

**Financial Accounting Standards Board (“FASB”)’s Disclosure of Certain Loss Contingencies, an amendment of FASB Statements No. 5 and 141(R)
Reference File No. 1600-100
Invitation for Comment: Responses to Specific Questions**

Question 1

Will the proposed Statement meet the project’s objective of providing enhanced disclosures about loss contingencies so that the benefits of those disclosures justify the incremental costs? Why or why not? What costs do you expect to incur if the Board were to issue this proposed Statement in its current form as a final Statement? How could the Board further reduce the costs of applying these requirements without significantly reducing the benefits?

Response

We do not think the Proposed Statement meets the objective of enhanced disclosures regarding loss contingencies. In fact, we believe the disclosure required under the Proposed Standard will not be meaningful. The exposure for many of the matters which are the subject of loss contingencies is inherently difficult to estimate with any meaningful precision. Similarly, it is equally difficult to assess the outcome of these matters with any degree of reliability. Claims and litigation are quite difficult to quantify and evaluate in this manner, particularly unasserted claims which by their nature lack clarity and definition. This would be especially difficult for any claims for which the likelihood of incurring a loss is considered remote (as would be required in the event a loss contingency is expected to be resolved within the near term and could have a severe impact on financial position, cash flows or results of operations). We, therefore, believe this would make compliance with the proposed disclosure requirements wholly problematic. Moreover, we believe resulting disclosures would be confusing if not entirely misleading.

We believe the disclosures will be extremely burdensome, time consuming, painstaking, and costly and will require significant involvement of a company’s outside counsel and auditors due to the complexity of the legal factors, uncertainty and potential exposure to the company, its counsel and auditors. We do not believe the disclosures will be meaningful and, as a consequence, do not believe the associated costs are justified. In view of the difficulty in quantifying and evaluating exposures due to inherent uncertainty and range of variables affecting both the quantitative and qualitative disclosures (as discussed above), a company may face significant litigation in situations in which the ultimate outcome is significantly different than previous disclosures, despite its best efforts to satisfy disclosure requirements. These costs will further exacerbate the cost-benefit disparity. If these disclosures were to be required on a quarterly basis, the costs would be even more substantial and the benefit even more dubious.

Question 2

Do you agree with the Board's decision to include within the scope of this proposed Statement obligations that may result from withdrawal from a multiemployer plan for a portion of its unfunded benefit obligations, which are currently subject to the provisions of Statement 5? Why or why not?

Response

We agree treatment of unfunded benefit obligations arising from multiemployer plan withdrawal in a manner consistent with other contingencies.

Question 3

Should an entity be required to provide disclosures about loss contingencies, regardless of the likelihood of loss, if the resolution of the contingencies is expected to occur within one year of the date of the financial statements and the loss contingencies could have a severe impact upon the operations of the entity? Why or why not?

Response

We do not think disclosure of potential loss contingencies where the exposure is considered remote (as would be required in the event a loss contingency is expected to be resolved within the near term and could have a severe impact on financial position, cash flows or results of operations) will provide useful information to investors. In view of the fact that the likelihood of loss from these contingencies has been assessed as remote, accumulating the information necessary to meet the disclosure requirements may be very challenging and given the lack of meaningful benefit to investors, is not worth the cost of doing so. Quantification of the potential exposure will be exceedingly problematic due to the inherent uncertainty involved in estimating any exposure for which the likelihood of an unfavorable outcome is remote – generally interpreted as an outcome with a probability of less than 5%. We also think the threshold for disclosure is unclear since severe impact is not defined nor currently well understood or widely used.

Question 4

Paragraph 10 of Statement 5 requires entities to “give an estimate of the possible loss or range of loss or state that such an estimate cannot be made.” One of financial statement users' most significant concerns about disclosures under Statement 5's requirements is that the disclosures rarely include quantitative information. Rather, entities often state that the possible loss cannot be estimated. The Board decided to require entities to disclose the amount of the claim or assessment against the entity, or, if there is no claim or assessment amount, the entity's best estimate of the

maximum possible exposure to loss. Additionally, entities would be permitted, but not required, to disclose the possible loss or range of loss if they believe the amount of the claim or assessment is not representative of the entity's actual exposure.

a. Do you believe that this change would result in an improvement in the reporting of quantitative information about loss contingencies? Why or why not?

b. Do you believe that disclosing the possible loss or range of loss should be required, rather than optional, if an entity believes the amount of the claim or assessment or its best estimate of the maximum possible exposure to loss is not representative of the entity's actual exposure? Why or why not?

c. If you disagree with the proposed requirements, what quantitative disclosures do you believe would best fulfill users' needs for quantitative information and at the same time not reveal significant information that may be prejudicial to an entity's position in a dispute?

Response

We do not believe the proposed disclosure requirements will improve the adequacy of quantitative disclosure about loss contingencies primarily due to the fact that in many cases the potential exposure, maximum exposure or range of loss is subject to significant uncertainties and in many cases may not be well defined until discovery is well underway or in the later stages of the litigation. The claim amount or maximum exposure may not provide any reasonable indication of the ultimate loss and, as a consequence, are not necessarily meaningful and could very well be misleading. In many cases, the claim amount or maximum exposure may be a significant multiple of the ultimate loss. Companies determining maximum exposure are likely to be conservative in making such judgments and to use a worst case scenario approach. Similarly, the range of loss may be so broad as to be essentially meaningless. Any of these measures would be seriously prejudicial to a company's interests.

Question 5

If a loss contingency does not have a specific claim amount, will an entity be able to provide a reliable estimate of the maximum exposure to loss (as required by paragraph 7(a)) that is meaningful to users? Why or why not?

Response

We think estimating the maximum exposure associated with a loss contingency will be very difficult. Claims and litigation are inherently difficult to estimate with any meaningful precision, particularly unasserted claims which by their nature lack clarity and definition. This would be especially difficult for any claims for which the likelihood of incurring a loss is considered remote (as would be required in the event a loss contingency is expected to be resolved within the near term and could have a severe impact on financial position, cash flows or results of operations). In many cases, the maximum exposure (or for that matter the claim amount) may be a significant multiple of the ultimate loss. Companies determining maximum exposure

are likely to be conservative in making such judgments and to use a worst case scenario approach. Therefore, we do not believe the maximum potential exposure would be meaningful and could be potentially misleading.

Question 6

Financial statement users suggested that the Board require disclosure of settlement offers made between counterparties in a dispute. The Board decided not to require that disclosure because often those offers expire quickly and may not reflect the status of negotiations only a short time later. Should disclosure of the amount of settlement offers made by either party be required? Why or why not?

Response

Multiple settlement offers can often be part of a normal negotiation process. Disclosure of any settlement offers would generally not be meaningful until the parties had entered into serious negotiations with the intent to settle the claim and a settlement agreement is reached. At this point, any settlement offer would generally require accrual in the financial statements rather than mere disclosure.

Question 7

Will the tabular reconciliation of recognized loss contingencies, provided on an aggregated basis, provide useful information about loss contingencies for assessing future cash flows and understanding changes in the amounts recognized in the financial statements? Why or why not?

Response

We believe this information would not be particularly meaningful to investors and could be significantly prejudicial to a company's interests. Even aggregation of the tabular information would not protect a company's interests in situations where there is a single principal claim or litigation matter. This would seriously undermine the Company's ability to litigate or settle any claim.

Question 8

This proposed Statement includes a limited exemption from disclosing prejudicial information. Do you agree that such an exemption should be provided? Why or why not?

Response

We believe that exemption is critically important to protecting a company's interests but believe that the proposed approach would be wholly ineffective in doing so.

Question 9

If you agree with providing a prejudicial exemption, do you agree with the two-step approach in paragraph 11? Why or why not? If not, what approach would you recommend and why?

Response

We believe that the two-step approach to exemption from disclosing prejudicial information is inherently problematic and would fail to protect a company's interests. Although the exemption permits aggregation of disclosures regarding contingencies, in many situations a company may have only a single matter of any significance. In these situations aggregation would not protect the company's interests. In addition, it would be quite difficult to meet the qualitative disclosure requirements for multiple claims in any meaningful manner. The second part of the two-step exemption would not adequately protect the company since it would nonetheless be required to "disclose the amount... a description of the loss contingency, including how it arose, its legal or contractual basis, its current status, the anticipated timing of its resolution" and "a description of the factors that are likely to affect the ultimate outcome of the contingency along with the potential impact on the outcome."

Question 10

The International Accounting Standards Board (IASB) continues to deliberate changes to IAS 37, *Provisions, Contingent Liabilities and Contingent Assets*, but has not yet reconsidered the disclosure requirements. The existing disclosure requirements of IAS 37 include a prejudicial exemption with language indicating that the circumstances under which that exemption may be exercised are expected to be *extremely rare*. This proposed Statement includes language indicating that the circumstances under which the prejudicial exemption may be exercised are expected to be *rare* (instead of *extremely rare*). Do you agree with the Board's decision and, if so, why? If not, what do you recommend as an alternative and why?

Response

Situations in which disclosure could compromise a company's legal position would not be rare but, in fact, quite common, if not universal. We do not believe that the two-step approach would adequately protect a company's interests.

Question 11

Do you agree with the description of *prejudicial information* as information whose "disclosure . . . could affect, to the entity's detriment, the outcome of the contingency itself"? If not, how would you describe or define *prejudicial information* and why?

Response

Yes.

Question 12

Do you believe it is operational for entities to disclose all of the proposed requirements for interim and annual reporting periods? Should the tabular reconciliation be required only annually? Why or why not?

Response

We do not believe it is necessary or meaningful to require these disclosures on a quarterly basis. We believe the existing requirements under APB Opinion No. 28, "Interim Financial Reporting" and Regulation S-X regarding situations requiring quarterly update of annual disclosure should be sufficient. In addition, we suspect it would not be practicable to conduct an assessment each quarter given the significant effort that would be required by the company, its counsel and auditors. Moreover, the costs would be even more substantial and the benefit even more dubious if these disclosures were required on a quarterly basis.

Question 13

Do you believe other information about loss contingencies should be disclosed that would not be required by this proposed Statement? If so, what other information would you require?

Response

No.

Question 14

Do you believe it is operational for entities to implement the proposed Statement in fiscal years ending after December 15, 2008? Why or why not?

Response

We do not think the transition provisions would afford sufficient time. We believe the transition will require at least one year from the publication of the standard. This would allow sufficient time for the audit and legal profession to align their respective professional standards (audit: Statement on Auditing Standards No. 12, "Inquiry of Client's Lawyer Concerning Litigation, Claims and Assessments"; legal: Statement of Policy Regarding Lawyer's Responses to Auditor's Request for information") to support these disclosure requirements.