LETTER OF COMMENT NO. 103

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Request for Comments on a Proposed Statement, *Disclosure of Certain Loss Contingencies, an amendment of FASB Statements No. 5 and 141(R)*

August 8, 2008

Mr. Russell G. Golden
Technical Director
Financial Accounting Standards Board
401 Merritt 7
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Dear Mr. Golden,

Thank you for the opportunity to offer comments on the FASB's June 5, 2008 Exposure Draft of Proposed Statement of Financial Accounting Standards, *Disclosure of Certain Loss Contingencies, an amendment of FASB Statements No. 5 and 141(R)* (ED). We provide our comments on behalf of Ascension Health, the nation's largest not-for-profit health care system, with annual operating revenues of over $13 billion and approximately $4.2 billion in taxable and tax-exempt debt in the public markets.

Our organizational structure consists of hundreds of separate legal entities, primarily not-for-profit hospitals and healthcare entities (with a few for-profit entities), located in 20 states and the District of Columbia. Our legal entities are organized into approximately 30 reporting units for financial statement reporting purposes, each of which receive some level of external audit review. Furthermore, many of these reporting units receive, either on a consolidated basis or on a stand-alone hospital basis based on regulatory requirements, separate audit reports. For the most recent fiscal year, over 30 separate full scope and limited scope audit reports will be issued within our System. Additionally, we file interim quarterly financial statements publicly via the Nationally Recognized Municipal Securities Information Repositories.[1]

Our System self insures business risks including those of a professional and general liability nature as well as workers compensation, via large centralized in-house risk management programs. Furthermore, Ascension Health also has a well-established corporate compliance

[1] Ascension Health is an entity within the scope of FSP FAS 126-1, *Applicability of Certain Disclosure and Interim Reporting Requirements for Obligors for Conduit Debt Securities.*

program, the primary purpose of which is to ensure the highest level of business and professional standards of conduct, compliance with federal, state and local laws and prevention and early detection of potential organizational and employee misconduct.[2]

We greatly appreciate and are supportive of the Board's continued efforts to promote projects and issue standards that will improve the relevance and usefulness of disclosures that will assist the users of financial statements, including the investment community, in their assessment of our organization's financial strength. However, we have significant concerns about the potential negative impacts to financial statement preparers and users that would result from the issuance of the ED in its current form. Our concerns are driven primarily by the following:

- The costs of compiling and preparing the expanded disclosures would be quite significant. Many not-for-profit healthcare providers are self-insured for various risks, including general and professional liability. These providers are highly reliant on attorneys, consultants and specialists in managing the risks of our complex, highly regulated and extremely technical industry. Involving these outside parties to the extent necessary to comply with the ED would be quite costly, although more concerning is the cost of providing potentially misleading information to users of the statements, and the disadvantages in litigation processes that would result from the required disclosures. We expect that audit fees would also increase significantly as the external auditors face the challenge of auditing information that their client and clients' attorneys will be reluctant to disclose, as disclosure may endanger the attorney client privilege of the work product. The costs of complying with the requirements of the proposed standard would far outweigh the related disclosures' potential benefits to the users of our financial statements.

- The disclosure of a significantly expanded volume of information surrounding contingencies, including unasserted claims and contingencies that are expected to likely be favorably resolved, will be wrought with guesswork, and may be grossly misleading to users of financial statements.

- The qualitative information required will lead to disclosure of information that could have a severely negative impact on our ability to defend certain claims. The information that would be disclosed under the requirements of the ED could very possibly result in the waiver of attorney client privilege and give adversaries an unfair advantage in litigation or settlement discussions.

- The disclosure of unasserted claims, combined with the fact that certain claims may have the ability to span over twenty years, will result in the disclosure of amounts that may be unrealistic, are highly uncertain and potentially very misleading to users of the financial statements. Preparers may find themselves in situations whereby they are tracking high profile cases in their industry and disclosing the potential for similar claims to be made against their organization. This may actually spark new claims to

[2] Ascension Health's Corporate Compliance Program was developed using elements of a Corporate Compliance Program established by the Office of Inspector General of the U.S. Department of Health and Human Services.

be made against the organization as claimants search for fertile ground to file copycat lawsuits.

In response to the specific questions posed in the ED, we would like to offer the following:

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?

We do not believe that users of our financial statements will generally benefit from the expanded disclosures, and furthermore strongly believe that the benefits will not outweigh the costs. Ascension Health records loss contingencies for many different types of liabilities and the cost that will be incurred to gather and disclose the expanded information will be excessive. These costs will include the extensive commitment of additional internal resources, as well as the involvement of external attorneys, consultants and specialists. Due to the many different reporting entities comprising Ascension Health, a process that ensures consistent and accurate development of expanded loss contingency disclosures for each separate category of liability will need to be developed and implemented in order to ensure similar estimation and reporting techniques are undertaken. Costs would primarily include time needed to develop what we would consider accurate estimates for quantitative information, significant additional time spent to determine how to comply with the proposed statement without jeopardizing the attorney-client privilege and/or work product doctrine, consultation with attorneys, consultants and specialists to develop the requested information and incremental audit costs to obtain external auditor comfort that the information is complete. Please note that different attorneys and specialists may be consulted at each one of our separate locations, requiring significant time to coordinate, review and consolidate all of this information into consolidated disclosures for the System's audited financial statements.

Generally speaking, with the exception of the specifically mentioned scope exceptions, the proposed statement would require disclosures about essentially all loss contingencies unless they are deemed to be remote. It is noted that disclosures are required for even remote contingencies if resolution is expected in the near term and the results could have a severe impact on the entity's financial position.

Furthermore, if an entity cannot determine that the likelihood of loss is remote, disclosures would also be required in these instances. It is reasonable to conclude, especially for entities as large and complex as ours, which could potentially have greater than one thousand asserted claims at any one time, that the cost of providing this information would far outweigh its benefit.

We believe costs could be better controlled if the disclosures related only to loss contingencies that were "anticipated to be realized in the near term," such as perhaps within twelve months of the balance sheet date.

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?

We have no comments with respect to this question.

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?

No. In our opinion, any loss contingency that can be determined to result in a remote likelihood of loss is not appropriate to disclose. To do so would result in misleading readers and users of financial statements, as, by definition of the word remote, many of these losses would never be realized. Disclosure of loss contingencies that are remote, in the context of paragraph 6, is deemed to be conceptually incongruent within the context of the remote exclusion in paragraph 5 of the ED. We also believe that claims deemed to be remote can be a highly judgmental area that would not easily lend itself to consistent definitions across organizations or types of loss contingencies.

Question 4:
Paragraph 10 of Statement 5 requires entities to "give an estimate of the probable 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?*

In response to question a), we strongly disagree that quantitative information provided under the requirements of the ED would result in an improvement of quantitative disclosures

surrounding loss contingencies. From an asserted claim perspective where a claim amount is specified, it is possible that the ultimate settlement amount will not materially approximate the original amount claimed. Settlement amounts can be far above or below the original amount requested. Accordingly, we feel it is reasonable to expect that the disclosure of amounts requested under any asserted claim is at least potentially a gross misrepresentation of our potential ultimate liability. For asserted loss contingencies where an amount is not assessed, we also disagree with a requirement to develop and disclose a range of loss, since the development of any such estimates would be highly subjective, as they would often be based on very limited facts. Furthermore, it is reasonable to expect that any estimate we would develop for these situations may not materially approximate amounts eventually asserted. In summary, therefore, disclosing quantitative information of either type of claim discussed above is deemed to be potentially highly misleading to a user of our financial statements.

In response to question b), and for the same underlying reasons discussed above, we do not believe that estimation and disclosure of an internally developed range of loss if an amount is not asserted by the claimant should be required. Doing so would result in disclosing information that may or may not ultimately prove to be materially accurate.

With respect to question c), the accuracy of any loss contingency estimate will improve as claims mature, as discovery (for case litigation) proceeds, new information comes to light, settlement claim amounts are discussed between the parties, etc. Furthermore, loss contingencies are deemed to be most accurately estimated within the "near term," as defined in paragraph 6(a) footnote 1 of the ED, of the resolution of the claim. We would recommend that quantitative disclosures be limited to this period of time, which would be deemed to result in the most materially accurate quantitative disclosures. To require estimates during periods of time for which reliable estimates cannot be determined is deemed to result in disclosures of high uncertainty and low value to a financial statement user.

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?

Generally, no. Primarily with respect to litigation related loss contingencies, it is deemed to be very difficult, if not impossible, to estimate with any degree of comfort or certainty the maximum potential loss that would subsequently be realized. Therefore, providing any type of quantitative disclosure with respect to paragraph 7(a) is reasonably expected to result in information that could more often than not be misleading to the financial statement user.

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?

We agree with the Board that settlement offers should not be required disclosures. In addition to the short-lived term of such offers as noted by the Board, settlement offers are regularly used as a negotiating tactic and do not reliably predict the ultimate outcome of claims. Settlement offers that are made by the defendant should be considered in estimating the minimum potential loss from the claim.

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?

We would like to better understand both the quantitative and qualitative data expectations as it is not clear to us from the ED how this aggregated information will benefit the users of the financial statements. The presentation of aggregated tabular information seems inconsistent with the detailed quantitative and qualitative disclosures required by paragraphs 4 through 7 of the proposed Statement. We suggest that the Board provide examples of the required disclosures.

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?

We submit that there should be an exemption from disclosing prejudicial information, but do not believe that the limited exemption proposed in the ED provides organizations such as ours with enough protection. Furthermore, we believe that the Board's proposed expansion of the disclosure requirements about certain loss contingencies presents a serious threat to reporting organizations, as such disclosures could result in waiver of the attorney-client privilege and the work product doctrine. If such a waiver occurs, adversaries in litigation will have ready access to confidential information that will increase the adversaries' leverage in litigation or settlement negotiations and impair a reporting organization's ability to defend against these same claims. Even in pre-litigation loss contingency situations, these waiver concerns could severely disadvantage reporting organizations with respect to other private or governmental parties with adversarial interests.

We believe that this is a very real concern for not-for-profit organizations that prepare financial statements in accordance with GAAP. For example, not-for-profit organizations in the healthcare industry such as ours are faced with a litany of claims that range from private lawsuits to governmental inquires and assessments. Furthermore, many nonprofit healthcare providers are self-insured for general and professional liability risks. As a result, not-for-profit organizations rely heavily on the advice of legal counsel in addressing their loss contingencies. We submit that the requirements of the ED will severely undermine a reporting organization's confidential relationship with its own legal counsel. We presume that the Board did not intend for this type of result, as we discuss more fully below.

The attorney-client privilege protects from disclosure to third parties confidential communications relating to legal advice clients seek from their attorneys. The purpose of this privilege is to "encourage full and frank communication between attorneys and their clients,"

based on the premise that an attorney cannot provide sound legal advice without being fully informed by his or her client. Conversely, any client fears regarding the continued confidentiality of these communications could mean that clients will be less willing to share critical information with their attorneys, thereby undermining their legal representation. The work product doctrine further protects from discovery documents and tangible materials that a party or a party's representative, such as an attorney or a consultant, prepares during or in anticipation of litigation. Despite these protections, it is well established that the attorney-client privilege and work product doctrine may be waived if an organization discloses qualifying communications to any third parties, including the organization's auditors. Further, selective waiver generally is not available in either situation, meaning that an organization usually cannot waive the attorney-client privilege or the work product doctrine as to one party, but then successfully assert the privilege or work product doctrine as to another party. Thus, reporting organizations normally have little ability to waive the privilege for purposes of communications with their auditors, but then later successfully assert the privilege against a litigant or other adversarial party. In other words, once an organization waives the attorney-client privilege and/or the work product doctrine, there is nothing to prevent a reporting organization's adversaries from obtaining confidential information through the discovery process and then using this information to the organization's detriment.

Of particular concern is that the ED requires disclosure of several categories of information that are likely to be based on confidential communications with a reporting organization's attorneys, which would otherwise be protected by the attorney-client privilege and/or work product doctrine. Such categories include the following:

- A description of the contingency, including how it arose, its legal or contractual basis, its current status and the anticipated timing of resolution;
- A description of factors likely to affect the outcome of the contingency along with the potential effect of the outcome;
- The organization's qualitative assessment of the most likely outcome of the contingency; and
- Significant assumptions made by the entity in estimating the amounts disclosed and in assessing the most likely outcome of the contingency.

If such information is disclosed to a reporting organization's auditors, as well as the public users of the financial statements, a court might find that the attorney-client privilege and work product doctrine are waived with respect to the confidential communications included in these disclosures. This would put reporting organizations at a distinct disadvantage in on-going or future litigation. Adversarial parties presumably would be able to access disclosed information through discovery based on this corresponding waiver of confidentiality. Adversaries may also claim that, through such disclosure, the reporting organization engaged in a "subject matter" waiver, thereby allowing adversaries access to an even broader array of the organization's confidential communications pertaining to related subject matter. This obviously could give adversaries an unfair advantage in litigation or settlement discussions and severely undermine the reporting organization's ability to defend against these same claims.

A related concern stems from the proposed requirement in paragraph 7(a) of the ED that a reporting organization disclose the amount of any claims or assessments against the organization, or the organization's best estimate of the *maximum* exposure to loss if there is no specific claim or assessment amount. The Board suggested that such disclosure is not prejudicial to organizations because claim and assessment amounts are objective and can be determined from court documents, which are publicly available. In this context, it is important to note that pre-litigation loss contingencies may not ever evolve into formal court filings. Additionally, it is possible that a reporting organization would be required to disclose an estimate of possible loss contingencies related to certain governmental investigations or inquiries regarding organizational operations. In these situations, there usually are no filed or even written dollar demands and reporting organizations may not be in a position to make accurate estimates of maximum exposure amounts. A requirement to nonetheless report estimates of maximum exposure in these situations may invite additional regulatory or whistleblower activity, which may not be warranted based on the facts of each case. This may actually trigger more loss contingencies for organizations. It also may result in more unasserted claims being asserted. We assume that the Board did not intend this type of potential harm to reporting organizations through the ED.

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?

See response to Question 8.

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?

We do not believe that disclosures should be made for loss contingencies that are deemed to be rare or extremely rare. Due to the extreme level of uncertainly involved in such instances, we do not believe that these types of disclosures are meaningful.

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?

We do not believe that the description of prejudicial information and accompanying disclosure requirements under the exemption adequately protect disclosing organizations. In an attempt to "strike a balance between the interest of both the users and preparers" of financial statements, the ED permits an organization to aggregate disclosures in situations

where the disclosure of information about a particular loss contingency may be prejudicial to an organization's position. Further, in the "rare instances" where aggregated disclosures would still be prejudicial to an organization's position, the ED allows an organization to forego making certain disclosures altogether. Unfortunately, this exemption fails to mitigate the above-described concerns surrounding a reporting organization's potential waiver of the attorney-client privilege and/or the work product doctrine and providing adversarial parties with confidential information.

Importantly, paragraph 11 of the ED states that "....the entity may forgo disclosing *only* the information that would be prejudicial to the entity's position." (emphasis added).. Despite the fact that any of the proposed disclosures could potentially result in waiver of the attorney-client privilege and/or work product doctrine, the ED notes:

> In *no circumstance* may an entity forgo disclosing the amount of the claim or assessment against the entity (or, if there is no claim amount, an estimate of the entity's maximum exposure to loss); providing a description of the loss contingency, including how it arose, its legal or contractual basis, its current status, and the anticipated timing of its resolution; and providing a description of the factors likely to affect the ultimate outcome of the contingency along with the potential impact of the outcome.

Based on this quoted language, it appears that the proposed exemption requires an organization to disclose much of the same information about a loss contingency that the organization would be required to report without the "benefit" of the exemption. In other words, if there is a recognized concern about prejudicing the reporting organization, then why does the ED still require the organization to provide this same quantitative and qualitative information about the loss contingency as would be the case with non-prejudicial situations? We respectfully submit to the Board that under this proposed language, any benefit that the exemption provides to reporting organizations is lost and no balance is struck between users and preparers of financial statements. Even in these "prejudicial" situations, reporting organizations would still be required to state the amount of the claim or estimate maximum exposure for unasserted claims and provide a qualitative description as to the basis for the claim, the timing of its resolution and its likely outcome. This requirement raises the same waiver concerns in response to Question 10 discussed above, and as a result, the exemption provides no real relief to reporting organizations. While we appreciate the Board's recognition that an exemption should exist for these prejudicial circumstances, the Board should further remove the language requiring this type of quantitative and qualitative disclosure in these circumstances. Our suggested revision to the exemption language would provide some protection to reporting organizations with prejudicial loss contingency disclosures which we assume was the primary objective of promulgating the exemption in the first place.

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?

We are of firm belief that provision of all disclosures, including tabular information, for interim periods would be a disservice to users of the financial statements. For organizations of our size, due to the volume of loss contingencies that could be outstanding at any one interim period end and the fluidness of the population of loss contingencies that are outstanding from one interim period end to the next, in respect of the deadlines within which we must provide interim information, an adequate amount of time to develop accurate estimates of quantitative information required by the ED does not exist. Additionally, many of the items that comprise our loss contingences are of a long-term (multiple years) nature, and disclosure for any periods less than an annual basis would not provide beneficial information and would impose significant hardships on financial reporting resources.

Additional items we feel warrant clarification in any final statement include:

- If an entity is out of scope with respect to the scope exception in paragraph 3(c), would that same entity continue to be out of scope with respect to the consolidated reporting entity, if the parent entity fully consolidates the "out of scope" entity? For example, Ascension Health currently consolidates an off-shore captive insurance entity whose financial statements are prepared under the provisions of FAS 60, *Accounting and Reporting by Insurance Enterprises*. While it is clear that from a stand-alone financial statement reporting perspective this entity would not be required to apply the provisions of the ED under the scope exception in paragraph 3, it is unclear if the ED requirements would apply to our consolidated System financial statements, as our System fully consolidates the results of this entity. We would appreciate further guidance for a situation such as this.
- The proposed effective date is considered to be aggressive in terms of the depth of evaluation and resulting time to effect attorney consultation that will be required to implement the guidance as the Board intends.
- Additional clarity is needed with respect to the scope of "employment-related costs," as included in the scope exception in paragraph 3(e), with respect to additional types of costs the Board intends to include in such a category. Specifically, would loss contingencies related to self insured health and workers' compensation plans, as well as contingencies related to self insured professional and general liability plans, be excluded from the scope of the proposed Statement?
- Primarily with respect to qualitative information, it is unclear how aggregated information could be provided in light of the specific detailed qualitative information required by paragraph 7(b). Furthermore, as the overall intent of the Board appears to support non-disclosure of prejudicial information, the requirements of paragraph 7(b) appear inconsistent with this notion. Further clarity is requested surrounding the intent behind the level of disclosure requirements in item 7(b), including providing illustrative disclosures in any final statement.

We would additionally like to suggest that the Board consider including the nature of the changes being proposed in this ED in its proposed joint project with the IASB on the recognition and measurement of accounting for certain non-financial liabilities, rather than issuing these changes in a new statement as anticipated under this ED.

We would greatly appreciate the opportunity to participate in upcoming roundtable meetings relating to the ED to discuss potential revisions that will result in meaningful information to our financial statement users without jeopardizing privileged information and creating burdensome disclosure requirements.

Sincerely,

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