

DELPHI



LETTER OF COMMENT NO. 115

August 8, 2008

Via electronic delivery to: director@fasb.org

Mr. Russell G. Golden
Director of Technical Application and Implementation Activities
Financial Accounting Standards Board
401 Merritt 7
PO Box 5116
Norwalk, CT 06856-5116

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

Dear Mr. Golden:

Delphi Corporation ("Delphi" or "the Company") is a leading global supplier of mobile electronics and transportation systems, including powertrain, safety, thermal, controls and security systems, electrical/electronic architecture and in-car entertainment technologies. The Company supplies products to nearly every major global automotive original equipment manufacturer, and has revenues in excess of \$22 billion and total assets of over \$13 billion.

We appreciate the opportunity to comment on the abovementioned Proposed FASB Statement, Disclosure of Certain Loss Contingencies, which amends Statements No. 5, *Accounting for Contingencies* ("SFAS No. 5"), and No. 141 (Revised 2007), *Business Combinations* ("SFAS No. 141(R)"), (the "proposed Statement").

The proposed Statement requires enhanced disclosures for loss contingencies which are recognized in the financial statements, as well as those loss contingencies which have a greater than "remote" possibility of occurrence. However, loss contingencies with a remote chance of occurrence are also within the scope of the proposed Statement if the loss contingency may have a severe impact on the entity's financial statements and the loss contingency is expected to be resolved within one year of the financial statement date. Loss contingencies for which a claim has not been asserted do not fall within the scope of the proposed Statement unless it is probable that a claim will be asserted and the likelihood that a loss will result from such claim is more than "remote."

Below are our responses on the questions posed in the proposed Statement.

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 the proposed Statement will meet the project's objective of providing enhanced disclosures about loss contingencies so that the benefits of those disclosures justify the incremental costs. The incremental costs incurred in preparing the proposed disclosures will not always lead to enhanced benefits to readers of financial statements. Delphi utilizes its professional judgment, together with the advice and recommendations of its internal and external legal counsel and its external auditors, to determine the nature and extent of disclosures currently required under SFAS No. 5. We believe our current disclosures present information required by the readers of our financial statements with the appropriate level of information regarding material contingencies to allow readers to make informed decisions. We also believe that many companies, on the advice of legal counsel, will avail themselves of the prejudicial information exception to providing enhanced disclosures, such that many of the disclosures will continue to be lacking. Enhanced disclosure will increase the risk a company might inadvertently waive attorney client privilege (or at least give a plaintiff grounds to assert such a waiver). Moreover, a court might construe such a waiver as a "subject matter" waiver allowing opposing counsel full access to otherwise privileged and confidential information. Additionally, we believe certain of the required additional disclosures are impractical to determine and in some cases may actually be misleading to the reader.

As a leader in automotive technology, Delphi is from time to time subject to various legal actions and claims incidental to its business including those arising out of alleged defects, breach of contracts, product warranties, intellectual property matters and employment-related matters. We believe that we have taken the necessary and appropriate measures to compile our various legal cases and claims to provide a reasonable estimate of our various exposures to loss. In conjunction with a team of internal and external counsel and our financial reporting staff, we maintain a comprehensive summary of each of our outstanding legal cases and claims, including a brief description of the case, an estimated probability of loss and the amount of the claim, or if an amount does not exist, an estimated range of exposure. Although we believe that we are in a position to disclose an accurate summary and estimated maximum exposure related to our loss contingencies by the time of the effective date of the proposed Statement, maintaining the accuracy of this comprehensive summary on a quarterly basis requires significant resources from our accounting and legal staffs. Another point to consider would be that Attorneys will have conflicting duties. On one hand, the duty of confidentiality, and, on the other hand, the enhanced duty of disclosure. Based on our experience and processes, we believe that companies that have not implemented similar internal processes to compile information regarding their outstanding loss contingencies on a quarterly basis will be required to invest a significant amount of time and resources to comply with the disclosure requirements of this proposed Statement.

If this proposed Statement is enacted in its current form, we expect significant additional internal costs, even with our current processes surrounding contingencies. We believe our current disclosures contain much of the information required by the proposed Statement for contingencies considered "probable" under SFAS No. 5. However, the proposed Statement would also require additional disclosure for all contingencies for which the likelihood of loss is not considered "remote," and this additional information would cause a significant burden on

Delphi to prepare disclosure for given the number of cases and claims that currently exist for which management, together with internal and external legal counsel and its external auditors, have deemed the information not to require disclosure pursuant to SFAS No. 5. Plaintiffs might be encouraged to make wildly excessive claims forcing companies to enter into quick settlement or risk disclosure. *Additionally, there are continually new cases that arise where we are simply unable to determine the validity of the claim as the discovery and/or due diligence review process is yet to occur, which could lead to premature disclosure of information that may ultimately be wholly misleading and detrimental to the Company. We fear that the financial statements will read more like a legal brief rather than a set of clear, concise statements and footnotes regarding a company's financial position and performance with loss contingency disclosures, as necessary, focused on truly the uncertainties warranting attention and discussion. Lastly, the disclosure of unasserted claims would also potentially provide notice to plaintiffs of claims about which they otherwise might not know.*

Additionally, there would be incremental cost due to the substantive additional review by our internal and external attorneys given the requirement to increase disclosure of potentially sensitive information, including expanded disclosures of expected loss amounts when such amounts may not be easily determined. The involvement of our external auditors will also be increased given the expanded disclosures, both on an interim and annual basis. Such involvement by our attorneys and auditors could come at a substantial incremental cost depending on the nature of the reviews and the extent of the disclosures required.

Finally, we do not believe that this proposed Statement should be enacted prior to the International Accounting Standards Board (IASB)'s reconsideration of the disclosure requirements of IAS 37, *Provisions, Contingent Liabilities and Contingent Assets*. If the FASB's ultimate goal is convergence with IASB standards, requiring adoption of this proposed Statement at this time is premature.

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 obligation, which are currently subject to the provisions of Statement 5? Why or why not?

Because the contingencies resulting from such actions are already encompassed by SFAS No. 5, they do not need to be specifically addressed by the proposed Statement.

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?

The proposed Statement requires disclosure of loss contingencies which have a remote likelihood of occurrence if the outcome may have a "severe" impact to the company's financial statements and if the outcome is expected to occur within one year. We are unable to see the benefit of such disclosure if those with the best information regarding the contingency, including management, legal counsel and external auditors, all deem and/or concur that a loss from the contingency is

remote. Also, we believe measuring loss contingencies which may have a “severe” impact allows for a significant amount of subjectivity, and will likely be inconsistent among companies. Further, it is unclear what is meant by “resolution of the contingency is expected to occur within one year...” Resolution could be defined as an initial court verdict, appeals verdict, ultimate settlement, etc, and is not likely to be consistent amongst companies or even between contingencies within the same company. This subjectivity and possible misinformation regarding losses unlikely to occur will likely lead to panic and possibly improper investing decisions by misinformed users of financial statements.

Eliminating such a requirement would also be consistent with IAS 37. If the Board’s ultimate goal is convergence between the accounting standards of the FASB and the IASB, implementation of a proposed Statement that is explicitly different is counterintuitive.

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?

Many loss contingencies do not have either specific claim amounts or ranges of claim amounts associated with them while other loss contingencies have grossly excessive claims. Such losses could be determined by a jury trial, which are notorious for a wide variety of outcomes in similar cases. Also, disclosure of the maximum possible exposure could lead to unnecessary panic and misinformed decisions by investors, who may expect that amounts disclosed in the financial statements will be realized, when the actual exposure to a loss contingency is an amount much smaller. This requirement forces a defendant entity to quantify its potential maximum exposure in an adversarial proceeding where the claimant itself has been unwilling or unable to quantify the maximum loss. Further, a significant potential exists for a lawsuit or claim against the company and management if the actual outcome of a contingency differs significantly from management’s disclosures.

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?

To require companies to disclose management’s estimate of the range of possible losses or even the maximum possible loss may require management to disclose prejudicial information which

could adversely affect the company and its stakeholders in negotiations, arbitration or litigation of the claim. Such disclosure could frame management's expected exposure for the opposing party and provide information that would otherwise not have been obtained via discovery, revealing aspects of the defendant company's thinking that here-to-fore has been carefully guarded in adversary proceedings.

- 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?**

We believe that the current disclosure requirements of SFAS No. 5 are appropriate.

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?

See our response to Question 4.

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's decision and believe that in no instance shall a company be required to disclose the current settlement offers between parties, due to the various reasons for making settlement offers. This position is consistent with Rule 408 of the Federal Rules of Evidence that prohibits the admissibility of offers to compromise. Settlement offers may be made in order to avoid the costs of litigation and reduce the risk of an adverse decision, and may not be indicative of the final outcome of a case. In such instances, disclosure of a settlement offer may be misleading to a reader. Additionally, in most cases, disclosure of the current settlements may lead to the disclosure of prejudicial information, which is exempt from quantitative disclosure under the proposed Statement. If the proposed Statement were to exclude a prejudicial exemption, this disclosure may provide others with the impetus to file "nuisance claims" in the hopes of at least obtaining a similar settlement offer.

Further, settlement offers often include various qualitative aspects which may or may not have any bearing on the ultimate resolution of the contingency from a quantitative perspective. In a negotiating and/or litigious environment surrounding a contingency, we can see no real substantive benefit to disclosing what could be a series of settlement offers over a certain time continuum.

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?

We believe that a tabular reconciliation will not provide useful information about loss contingencies for assessing future cash flows. The proposed Statement only requires a tabular reconciliation regarding cash flows incurred in the current period only for contingencies, and does not require disclosure of future periods' payments. Information about past losses is in no way indicative of future losses. We believe that the current disclosure requirements under SFAS No. 5 require a company to disclose significant changes in its recognized loss contingencies, and to do so in a tabular format would only increase confusion, especially if contingencies are combined.

Further, a company may have a recognized loss contingency which is immaterial to the financial statements and is not disclosed separately. Inclusion of such items in a tabular reconciliation may be confusing to a reader of the financial statements.

Question 8: This proposed Statement includes a limited exception from disclosing prejudicial information. Do you agree that such an exemption should be provided? Why or why not?

We do believe that an exception for prejudicial information should be provided if the proposed Statement were adopted as a final Statement in its current form. We agree that there is information related to certain loss contingencies that, if disclosed, may affect the outcome of the contingency and provide the opposing side with information it may not otherwise obtain in the course of its discovery. Although we believe that such an exception is required, we do believe that this exception will likely be utilized more often than in "rare" circumstances, and will likely continue the current trend of minimal disclosure in financial statements with respect to significant contingencies.

Additionally, it is difficult for us to see how requiring additional tabular quantitative disclosure along with a subjectively and individually defined prejudicial exemption will lead to greater transparency and comparability of financial statements.

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?

As discussed in Question 7 above, we do not believe that a tabular reconciliation is a useful disclosure to investors. By including this approach in the proposed Statement, we believe that companies will likely be overly cautious when determining their prejudicial loss contingencies, thereby combining all loss contingencies to provide only disclosure of the total loss contingencies, or excluding the disclosure altogether as prejudicial. Having such a process for the prejudicial exceptions will not rectify the perceived lack of disclosed information relating to loss contingencies as delineated in the Board's added goals for this proposed Statement.

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 strongly agree that a prejudicial exemption from disclosure is needed. We also believe that the prejudicial exemption will be exercised more often than in rare or extremely rare cases. If the proposed Statement is adopted, a prejudicial information exception must be included and not limited to rare or extremely rare cases.

We also believe that this proposed Statement should not be considered for adoption until such time as the IASB reconsiders its disclosure requirements in order to facilitate the convergence goals between the IASB and the FASB.

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 agree with this definition, but believe that the definition should be expanded to include other similar contingencies.

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 believe the requirements should only apply to annual reporting periods, consistent with the current Regulation S-X framework, wherein annual disclosures need not be repeated in interim periods unless a significant change has occurred.

We do believe, however, that financial reporting for interim periods is just as important as for annual periods. However, the short time between the end of an interim period and the deadline for filing quarterly reports with the SEC causes any increased disclosure for interim periods to require significant additional resources to compile and disclose such information timely.

We believe that the existing requirement for entities to only disclose any significant changes of recognized loss contingencies during an interim period, where considered material, rather than reproducing an entire tabular reconciliation for each interim period is appropriate.

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?

We do not believe other information about loss contingencies should be disclosed.

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?

We do not believe it is operational for entities to implement the proposed Statement for fiscal years ending after December 15, 2008. As the comment period for this proposed Statement expires August 8, 2008, we believe that a final statement would be unlikely to be issued prior to the fourth calendar quarter of 2008. The process that some companies may be required to implement in the wake of such a proposed Statement may require significant additional resources, both internally and externally. This would put a significant burden on entities, with only a short period of time to develop and implement a reporting and disclosure process, especially considering the documentation and testing requirements of the Sarbanes-Oxley Act for public companies.

Also, as the FASB is considering field testing this proposed Statement, we believe that the timing to implement at the end of fiscal 2008 is too accelerated to ensure any modifications to a final standard are appropriately exposed to the due diligence process.

Finally, with the ultimate goal of convergence with IASB standards, we believe that to enact such a standard prior to the IASB's reconsideration of disclosure requirements of IAS 37 is premature.

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We appreciate the opportunity to provide you with our comments. If you have any questions or wish to discuss these matters further, please do not hesitate to contact me directly at 248-813-2605.

Sincerely,



Thomas S. Timko
Chief Accounting Officer and Controller