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Serving Investors, Public Company Auditors & the Markets

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LETTER OF COMMENT NO. 17

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Robert H. Herz, Chairman
Financial Accounting Standards Board
401 Merritt 7
PO Box 5116
Norwalk, CT 06856-5116

Dear Mr. Herz:

For calendar-year end companies, FAS 141(R), *Business Combinations*, will generally require companies to recognize many acquired contingencies at fair value starting in 2009, which is a significant change from current practice. The Center for Audit Quality believes that the recognition of acquired contingencies at fair value, particularly litigation related contingencies, due to the unique nature of the U.S. legal environment and its influence on the evolving nature of most contingencies, has the potential to result in unintended costs that outweigh the desired benefits of this information as called for by FAS 141(R).

We commend the FASB for delaying its project on revising loss contingency disclosures and recommend, for similar reasons, that the recognition, measurement and disclosure provisions for acquired contingencies as prescribed in FAS 141(R) be deferred as well.

The data and assumptions needed to measure litigation related contingencies at fair value will be based on information that constitutes advice from counsel about a company's legal strategy. In addition, to effectively perform an audit, a company's independent auditor will also need supporting evidence for, and legal counsel's view of, management's estimates and judgments used to determine the fair value of contingencies and the related disclosures. Companies and their counsel recognize that once such information is provided in public filings, plaintiffs can be expected to argue that the attorney-client and attorney-work product privilege has been waived and they, too, should have access to the underlying data and assumptions. However, maintaining the protections afforded by attorney-client and attorney-work product privilege is a cornerstone of the U.S. legal process. Additionally, even in cases where the privilege is upheld, companies are concerned that the fair value estimate of the loss contingency in the financial statements will itself be used by plaintiffs to set a floor for damages. As such, the risk of losing the protection of the privilege, or setting a floor for damages, is likely to be detrimental to

management's legal strategy and inconsistent with their fiduciary responsibilities to protect shareholder value.

These challenges are consistent with those highlighted by a broad range of constituents in their extensive feedback on the FASB's recent proposal to amend the requirements for disclosure of loss contingencies. In response to these challenges, the FASB delayed its project on revising loss contingency disclosures so that it can better weigh the implications of putting into the marketplace more information about matters that, in many cases, are highly uncertain, as well as potentially detrimental to a company's legal position. By allowing that process to play out — in collaboration with the legal community, investor groups, companies, auditors, regulators, and other constituencies — the FASB will be able to address the unintended consequences of divulging more information about loss contingencies. This should ultimately pave the way to solutions that provide more information that benefits the capital markets while avoiding undue strain on preparers, the legal community and the auditing profession.

We would be pleased to discuss our comments with the Board members or the FASB staff at your convenience.

Very truly yours,



Cynthia M. Fornelli
Executive Director
Center for Audit Quality