



**Law Department**  
Janet L. Bartelmay  
Associate General Counsel  
and Corporate Secretary

LETTER OF COMMENT NO. 18

November 4, 2008

Mr. Robert Herz  
Chairman  
Financial Accounting Standards Board  
401 Merritt 7, P.O. Box 5116  
Norwalk, CT 06856-5116

Dear Mr. Herz:

The Association of American Railroads ("AAR") respectfully requests that the Financial Accounting Standards Board ("FASB") delay the implementation of SFAS 141(R) dealing with Business Combinations. SFAS 141 (R) raises many of the same issues as those addressed in FASB's exposure draft "Disclosure of Certain Loss Contingencies: an amendment of FASB Statements No. 5 and 141 (R)" ("Exposure Draft"). AAR, like many others, expressed serious concerns about the Exposure Draft. As a result, FASB determined that it would be prudent to delay the implementation of those changes and further deliberate the matters involved. (A copy of AAR's comments is attached.) Because SFAS 141(R) raises many of the same issues regarding loss contingencies as those in the Exposure Draft, it would only be prudent for FASB to similarly delay the December 15, 2008 implementation of SFAS 141(R), or at least the loss contingency provisions, to allow these issues to be thoroughly addressed.

Sincerely,

A handwritten signature in cursive script that reads "Janet L. Bartelmay".

Attachment

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS  
ON THE PROPOSED STATEMENT  
OF FINANCIAL ACCOUNTING STANDARDS;  
DISCLOSURE OF CERTAIN LOSS CONTINGENCIES;  
AN AMENDMENT OF FASB STATEMENTS NO. 5 AND 141(R)  
(File Reference No. 1600-100)

The Association of American Railroads (AAR) submits these comments on the Exposure Draft of the Proposed Statement of Financial Accounting Standards regarding Disclosure of Certain Loss Contingencies. AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak<sup>1</sup>. AAR members include large (Class I) and small railroads operating in the United States that prepare financial statements in accordance with U.S. GAAP. In matters of significant and common interest to its members, AAR frequently appears before Congress, the courts and administrative agencies on behalf of the railroad industry. The Exposure Draft presents such a matter.

The Exposure Draft would amend Statement 5 to expand the universe of loss contingencies that must be reported and to require additional qualitative information about those loss contingencies. Among other things, it would impact the obligation of entities, including railroads, to disclose information on pending and potential litigation. As large corporate entities facing a significant number and wide variety of claims and lawsuits at any given time, railroads have a number of concerns about the Exposure Draft.

The Exposure Draft would require reporting on more cases and providing more qualitative information on those cases. To begin, all loss contingencies would have to be disclosed where the likelihood of loss is more than remote. Even where the likelihood of loss is considered remote, disclosure would have to be made if the contingency is expected to be resolved within a year and could have a severe impact on the entity's financial position. An unasserted claim would have to be disclosed if it is probable that it will be asserted and the likelihood of loss is more than remote. Additionally, for loss contingencies that must be disclosed, the Exposure Draft would call for a significant amount of qualitative information in order to "enable users to understand the risks posed to the entity." These requirements present two critical problems for corporate defendants, railroads included.

First, once a disclosure is made, and thus becomes available to the opposing party in litigation, the disclosing entity's litigation and settlement

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<sup>1</sup> AAR members include Anacostia & Pacific Company, Inc.; BNSF Railway Company; Canadian National Railway; Canadian Pacific Railway; CSX Transportation Inc.; Genesee & Wyoming Inc.; Iowa Interstate Railroad, Ltd.; Kansas City Southern Railway Company; METRA; National Railroad Passenger Corporation (Amtrak); Norfolk Southern Corporation; Union Pacific Railroad; Vermont Railway; and Wheeling & Lake Erie Railway.

positions stand to suffer a significant detrimental effect. For example, in many jurisdictions complaints need not and do not state a specific amount of damages, but simply claim a loss in excess of the applicable jurisdictional threshold (e.g., \$75,000 in federal diversity lawsuits). Under the Exposure Draft, the onus would be on the disclosing entity to disclose the maximum potential exposure or possible range of loss. This suggests that the worst case scenario must be conceived and disclosed, leaving the disclosing entity to omit even the most extreme allegation only at significant risk. When punitive damages are sought, not an uncommon situation, maximum potential exposure becomes even more open-ended.

Under such circumstances, corporate defendants would be faced with a potentially egregious whipsaw. On the one hand, the new Statement 5 standards as represented by the Exposure Draft would exert pressure on companies to skew claim evaluations toward the high end lest they be subject to after-the-fact accusations that they failed to make “proper” disclosures. On the other hand, the disclosed amounts, although in excess of the most likely value of the case, would be held against companies, possibly being admissible in evidence and used to mislead a jury as to the amount of damages properly awardable to plaintiffs or creating pressure to settle for higher amounts. Either result would harm the very people the Exposure Draft seeks to protect—investors.

Second, of equal or possibly even greater concern is the prospect that disclosure of qualitative information (e.g., factors likely to affect outcome and their potential effect, the most likely outcome of a case, and significant assumptions made in estimating amounts disclosed) could reveal to an opposing party information that would give it insight into the disclosing entity’s strategies, case assessments and legal theories, information it otherwise would not be able to obtain. In this manner, the Exposure Draft strikes at core elements of the legal system critical to its proper functioning – the attorney-client privilege and the attorney work-product protection. Such information does not merely have the potential to give the opposing party an even greater advantage in both settlement negotiations and other aspects of the litigation strategy; it would effectively deprive a disclosing entity of the benefits of legal counsel and the ability to put on its case in the manner contemplated by the legal system. Moreover, disclosure of such information outside of litigation could be deemed a waiver of otherwise applicable privileges, potentially making an even broader array of information susceptible to discovery by opposing parties and compounding the problem by great measure.<sup>2</sup>

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<sup>2</sup> The Exposure Draft suggests that litigation problems can be avoided by the allowance of aggregation of contingencies. However, at this point there is no credible basis to conclude that aggregation will inhibit sophisticated litigants (or their counsel) from ferreting out information about a particular case even where aggregation occurs.

The foregoing discussion applies to virtually all companies that prepare financial statements in accordance with U.S. GAAP. However, the problems are particularly exacerbated for the railroad industry.

Although railroads face an array of litigation similar to other companies, the railroad industry is distinguished from virtually all others by the Federal Employers' Liability Act (FELA), a negligence law that is the exclusive remedy for rail workers who are injured on the job.

FELA differs markedly from the no-fault workers' compensation laws that cover workplace injuries in other industries. Under FELA, a worker's right to compensation is conditioned on a showing of employer fault, and the amount of damages that may be recovered is not capped or limited like it is under workers' compensation laws. Moreover, instead of adjudicating disputes through an administrative process, disputes over liability and damages under FELA that cannot be settled directly by the parties are resolved through lawsuits.

While many FELA cases are settled quickly and routinely, a significant number proceed to full trial and verdict. Because FELA damages are uncapped, and may include an award for non-economic losses, large verdicts are not uncommon, and very large verdicts (perhaps reaching the "materiality" threshold) are within the realm of possibility. Whereas the limitations on benefits under the workers' compensation scheme make it a virtual certainty that the typical employer would never have to disclose loss contingencies arising from employee injury claims, FELA presents almost the exact opposite scenario for railroads under the Exposure Draft.

Finally, the critical flaws embodied in the Exposure Draft do not stand to be offset by any commensurate benefit to users of financial statements. While the burdens that are likely to be imposed on disclosing entities are real, it is not clear that any putative benefits to users of the information will be realized. First, the fact is that predictions of the likelihood and amount of a loss often can be nothing more than educated guesswork, particularly when all possibilities more than remote must be considered. Second, it is questionable whether disclosures based on the Exposure Draft—which may require worst-case scenarios—can truly be relied on by users of the information for investment and other decisions. As discussed previously, the interaction between litigation and disclosures under the Exposure Draft could produce significant volatility, creating the potential for loss contingencies to be dramatically overstated or understated. Neither possibility would benefit users of financial statements.

Thus, when the detrimental impact of the Exposure Draft on an entity's ability to effectively conduct litigation is coupled with the questionable quality of information that would be disclosed, it becomes clear that the Exposure Draft stands to do its intended beneficiaries - investors - more harm than good.