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August 8, 2008

LETTER OF COMMENT NO. 142A

Technical Director – File Reference No. 1600-100
Financial Accounting Standards Board
Of the Financial Accounting Foundation
401 Merritt 7
P.O. Box 5116
Norwalk, CT 06856-5116

Re: Comments on Exposure Draft on Proposed Statement of Accounting Standards, *Disclosure of Certain Loss Contingencies, an amendment of FASB Statements No. 5 and 141(R)*

To Whom It May Concern:

Wilson Sonsini Goodrich & Rosati ("**WSGR**") appreciates the opportunity to respond to the Exposure Draft on the Proposed Statement of Accounting Standards, *Disclosure of Certain Loss Contingencies, an amendment of FASB Statements No. 5 and 141(R)* (the "**Exposure Draft**").

WSGR fully supports and endorses the comments submitted by the American Bar Association in its letter to the Financial Accounting Standards Board ("**FASB**") dated August 5, 2008 (the "**ABA Letter**"). In addition to the significant concerns noted in the ABA Letter, WSGR has the following additional concerns regarding the Exposure Draft's approach to the disclosure of contingencies arising from pending or threatened legal claims:

1. We strongly concur with the observation in the ABA Letter that the proposed amendments are very likely to put strains on the "Treaty"[1] between the ABA and the AICPA that has governed lawyers' responses to auditors' inquiries for over 30 years. We believe that proposed amendments in the Exposure Draft will negatively impact lawyers' responses to auditors under the Treaty. As a practical matter, because the current standards for judging a loss contingency to be either "probable" or "remote" are so high, most loss contingencies fall into the category of "reasonably possible." In addition, it is uncommon for legal counsel to estimate a loss or range of probable loss under the Treaty because the applicable standards require that the attorney conclude that the probability of inaccuracy of the estimate is slight. In short, the Statement of Policy and accompanying Commentary make clear that, for numerous reasons,

[1] The "Treaty" is comprised of two documents: the ABA Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information (the "**Statement of Policy**"), adopted by the ABA Board of Governors in 1975, and the AICPA Statement on Auditing Standards No. 12, adopted in 1976.

legal counsel is not likely to conclude that a loss contingency is either probable or remote and rarely give an estimate or range of loss. Significant litigation, therefore, is most often disclosed in the financial statement notes on a factual basis limited to describing the nature of the claims with limited qualitative assessment or discussion and no estimate of loss or range of probable loss. In addition, where no accrual is being made, the issuer has in effect determined that the matter will not have a material adverse effect on the issuer's financial position or results of operation. The Exposure Draft requires both a qualitative assessment of litigation determined to be "reasonably possible" (which is the most likely scenario), and even remote loss contingencies in certain situations, as well as an estimate of loss or range of loss. We believe this kind of disclosure will likely embolden plaintiffs and frustrate settlement discussions. In addition, the new standards will clearly put pressure on counsel to provide additional qualitative analysis and loss estimates, both of which are directly contrary to the mandates of the Treaty. As a result, counsel may well be put in an adversarial relationship with its client in weighing the requirements and risks of disclosure (*e.g.*, underestimating loss) against the interests of protecting the client and preserving the privilege. The likely net result will be to eviscerate the fundamental principles articulated in the Treaty.

2. We believe the proposed amendments may also impact the role of Exchange Act Rule 13b2-2 with respect to the manner in which lawyers respond to auditors' inquiries. Prior to the amendments directed by Section 303 of the Sarbanes Oxley Act of 2002, the standard applicable to lawyers when responding to auditors was that they could not "knowingly" (*i.e.*, a fraud standard) participate in a violation by the client of the disclosure rules. However, Exchange Act Rule 13b2-2 now imposes a simple negligence standard on attorneys where they "know or should know that their conduct, if successful, could result in rendering the issuer's financial statements materially misleading" (SEC Release No. 34-47890). Given both the negligence standard imposed by Rule 13b2-2 and the substantial litigation risks to lawyers associated with underestimating the exposure for a particular claim, we believe that the resulting qualitative disclosure and loss estimates provided by lawyers are likely to be overly conservative and not necessarily representative of a Company's actual exposure. This will most certainly put strains on the attorney-client relationship and may ultimately lead to a chilling effect on communications between a Company and its attorneys.

For these reasons, as well as the concerns outlined in the ABA Letter, WSGR urges FASB not to adopt the amendments as proposed.

Thank you for considering our view on this critical subject. We would be pleased to discuss our comments and to answer any questions that FASB may have. Please do not hesitate to contact Mark Bertelsen or Glenn Luinenburg at 650-493-9300 regarding our submission.

Sincerely,

Wilson Sonsini Goodrich & Rosati

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