KOCH INDUSTRIES INC

September 10, 2010

Mr. Russell G. Golden
Technical Director
Financial Accounting Standards Board (FASB)
401 Merritt
P.O. Box 5116
Norwalk, CT 06856-5116

Email: director@fasb.org

RE: File Reference No. 1840-100
FASB Exposure Draft: *Disclosure of Certain Loss Contingencies*

Dear Mr. Golden:

We are writing on behalf of Koch Industries, Inc. ("KII") in response to your invitation to comment on the matters included in the FASB Exposure Draft on *Disclosure of Certain Loss Contingencies*. KII and its subsidiaries ("Koch companies") are engaged in operations, trading and investments worldwide and in many industry sectors. Koch companies have a presence in nearly 60 countries and approximately 70,000 employees worldwide. A number of Koch companies, including KII, are both issuers of non-public financial statements and users of financial statements in the ordinary course of business. In addition, KII is a participant on the AICPA/FAF/NASBA "Blue-Ribbon" Panel on Standard Setting for Private Companies and a member of FASAC.

We appreciate the efforts of FASB to continue to review and, where necessary, revise its standards to meet the needs of the issuers and users of financial statements. We also appreciate the continued opportunity to provide comment on the FASB Exposure Draft on the disclosure of certain loss contingencies. We believe, as a private company, that many of the proposed changes are neither necessary nor appropriate for private companies. Moreover, many of the proposed changes raise significant concerns to private and public companies alike, and we believe that the risks purported to be addressed by the proposed changes do not justify the changes.

As an initial matter, we do not believe the new FASB Exposure Draft adequately addresses the concerns we previously raised with you regarding the initial Exposure Draft issued in 2008. A copy of our August 7, 2008 letter to FASB is attached to this letter for your reference. While the most recent Exposure Draft is an improvement in some areas from the 2008 Exposure Draft (e.g., not requiring entities to disclose their "best estimate of the maximum exposure to loss" or a "qualitative assessment of the most likely

outcome"), in other instances it would, in our view, create greater harm than would have been created by the 2008 Exposure Draft (e.g., deletion of the previously proposed prejudicial exemption, disclosure of possible recoveries from insurance and other sources). We do not believe the Exposure Draft is an improvement from the status quo. Further we do not believe the proposed disclosures are operational or otherwise practical, and we have serious concerns about the impact this Exposure Draft would have on companies in general and on private companies in particular.

To this end, we would like to focus our comments on the following categories:

(1) Impact of this Exposure Draft on a non-public entity;
(2) Impact caused by this Exposure Draft on how civil litigation is conducted; and
(3) The risks associated with implementing this Exposure Draft without coordinating with the IASB's current proposed standards.

Impact to a Non-Public Entity

Simply put, the underlying premise which FASB has stated for issuing this Exposure Draft does not apply to KII and the majority of privately-held companies. In the first sentence of its Summary and Questions for Respondents, FASB explains that:

> [i]nvestors and other users of financial reporting have expressed concerns that disclosure about loss contingencies under the existing guidance . . . do not provide adequate and timely information to assist them in assessing the likelihood, timing, and magnitude of future cash outflows associated with loss contingencies.

Neither these intended beneficiaries, nor the intended reasons for the additional proposed disclosures, would apply to KII and other private companies where key shareholders are involved in company operations. Investors in privately held companies have access to detailed financial information, including information regarding potential loss contingencies, through a variety of means, including through Board membership or, in some cases, as officers and employees of the underlying company. Thus, there is no need for separate audited financial statements that contain the level of detail required by the proposal. The stated need for the same level of transparency in financial statements, therefore, does not exist for private company investors. As far as we are aware, and certainly through our experience as a privately-held company for over seventy years, private company investors regularly utilize all available means to get information about the company's financial circumstances, and we are unaware of complaints by private company investors in this regard.

Moreover, users of private-company financial statements are more limited than in a public company and, in our case, are limited to rating agencies and financial institutions such as creditors and lenders. They have and in our experience exercised the ability to obtain information on a confidential basis. Further, unlike long-term investors, rating agencies and/or creditors are primarily focused on the company's short- and medium-

term performance and liquidity position consistent with the creditor time horizon. The disclosure of remote loss contingencies called for in the proposed Exposure Draft would be of lesser value in this analysis given the inherent time distance and uncertainty surrounding a remote outcome. Loss contingencies already required by existing accounting standards, including disclosures for probable loss contingencies, are much more relevant to a company's short- and medium-term liquidity position. In addition, extensive information regarding our businesses, strategies, and other matters (which may include loss contingencies) is provided directly to the rating agencies and financial institutions on a regular basis.

Differentiation between public and private companies is recognized in a variety of different contexts, and it should be further recognized when it comes to this Exposure Draft. For example, the Sarbanes-Oxley Act ("SOX") was signed into law to address many of the same underlying concerns reflected in this Exposure Draft – the idea that a company needed to be more transparent to ensure that the market (and, in particular, potential and actual investors) was not defrauded by misrepresentations or omissions made by the company. The majority of SOX applies to publicly-traded companies only – a clear recognition by Congress that the transparency risks for public and private companies are different. As Congressman Oxley explained during deliberations on SOX in the House of Representatives, the Act would:

> provide[] enhancements necessary to support the Securities and Exchange Commission in its role to protect investors of public companies, including the unique relationships of auditors to the absentee shareholder. It is not intended to extend to auditors of privately-held companies or other, smaller regulated entities. These entities are uniquely different from global public companies in many ways. For example, many of these smaller companies do not have large executive staffs. Instead, they rely on their CPA/auditor to provide objective, trusted advice and counsel on a broad range of tax and business issues. Extending the reach of these restrictions to such firms could create unintended harmful consequences to an important segment of the U.S. economy.

148 Cong. Rec. E657-03, 2002 WL 753596 (Cong. Rec.).

All companies, in deciding whether to sell their stock publicly, need to weigh the advantages and disadvantages of public trading. While public companies have the advantage of access to the capital markets and the potential for significant increases in the market value of the company's stock created by fluctuations in market demand, private companies trade that benefit (a very real benefit) in exchange for the avoidance of the costs associated with being publicly traded (e.g., SEC reporting requirements, Sarbanes-Oxley requirements, public communications to the markets, addressing shareholders and the market). The proposed Exposure Draft, by treating public and private companies virtually identical (but for the tabular reconciliation section and the implementation date), blurs these distinctions and creates disclosure requirements not otherwise required, expected and, most importantly, needed of privately-held companies. Indeed, privately-

held companies choose to be privately held in part to avoid the additional costs associated with the disclosure requirements of publicly-traded companies. By treating disclosures of privately-held companies the same as those of publicly-traded companies, the Exposure Draft creates a disproportionate burden on privately-held companies where it is not otherwise needed. Therefore, these proposed disclosure requirements, which are clearly tailored to publicly-traded companies, should not apply to privately-held companies.

Harm Caused in Civil Litigation

We remain concerned that the proposed changes to the Exposure Draft would create significant risk of harm to entities – both public and private – in the context of civil litigation. Despite comments in the current Exposure Draft that FASB believes it has addressed the concerns in these areas raised by the 2008 Exposure Draft, we do not believe the changes mitigate in any meaningful way the risk. In fact, we believe the proposed changes will have a significant, negative impact on corporate defendants and their ability to properly manage and defend against civil litigation. It will shift the balance squarely to the disadvantage of the preparers of financial statements and their investors, and it will inevitably lead to a surge of civil litigation, with the inherent inefficiencies and costs associated with litigation.

Specific examples of these negative consequences include:

(1) **450-20-50-1F (e)(1), (f)(1) – disclosure "in the case of litigation contingencies, [of] the amount claimed by the plaintiff or the amount of damages indicated by the testimony of expert witnesses."**

Neither the amount of damages claimed by a plaintiff nor the amount of damages indicated by expert testimony paint an accurate picture of likely exposure in an underlying lawsuit. A plaintiff as a matter of course will exaggerate her claim for damages (if she even states a number at all) because the plaintiff does not want to create a damages ceiling that could under any conceivable scenario be an upward limit during the litigation process (e.g., mediation, settlement discussions, dispositive motions, trial). Further, an expert's testimony on damages is inevitably dependent upon the party paying for that expert. Indeed, a party can secure multiple consulting experts until they find an expert who will give them an opinion that provides them the most favorable testimony, and then disclose during discovery that testimony only. Therefore, this information will not provide more accurate information to investors – to the contrary, the underlying information will provide less accurate information to investors. It will also potentially inflate the perceived value of the underlying dispute, which could, in addition to confusing potential investors and potentially negatively impacting a company's market value, serve as an inaccurate bellwether for plaintiffs' attorneys seeking to find ripe targets.

(2) **450-20-50-1F (e)(2) – disclosure of "all contingencies that are at least reasonably possible……and the amount accrued, if any."**

The disclosure of any accrued amount could result in two highly prejudicial consequences. It could result in a waiver of privilege or work-product protection because the amount of the accrual is frequently determined with the advice of counsel, and the underlying data/documentation associated with that decision is subject to privilege. In addition, it could give litigation adversaries a major tactical advantage in settlement negotiations by telling them the amount the entity has determined as a "probable" or "reasonably estimated" loss. Disclosed accrual amounts would effectively serve as a floor to any subsequent settlement discussions. By demanding disclosure of accrual amounts, the Exposure Draft creates pressure on companies to re-think their accrual process.

Further, given the current Exposure Draft does not include the previously proposed prejudicial exemption, this Exposure Draft keeps the same litigation risks we raised with respect to the prior Exposure Draft, without providing any protection against what will inevitably become prejudicial to the preparers of the financial statements, as well as to the investors of those preparers who are harmed by the underlying disclosures.

(3) **450-20-50-1F (e)(5), (f)(3) – disclosure of "…..Information about possible recoveries from insurance and other sources if … it is discoverable…. If the insurance company has denied, contested, or reserved its rights related to the entity's claim for recovery, an entity shall disclose that fact."**

Information regarding possible recoveries from insurance is almost always discoverable in any given case and thus would be required to be disclosed, even where it had not been previously provided to a plaintiff. This disclosure would prejudice a company through the broadcast of their liability coverage terms to other potential litigation adversaries, again creating an open invitation to additional litigation not based on the potential merits of a claim but on the size of the pockets available to resolve it.

(4) **450-20-55-1D (b) – "if disclosures are provided on an aggregated basis, . . . an entity should consider disclosing . . . the average settlement amount."**

Any disclosure of an average settlement amount in an aggregated context would serve as a floor for all future settlement discussions involving similar claims and would be entirely unworkable from a civil litigation management perspective.

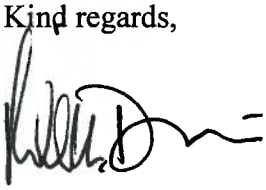
IASB Proposed Standards

The proposed guidance in the Exposure Draft is divergent from existing International Financial Reporting Standards, along with the International Accounting Standards Board ("IASB") ED/2010/1 on Measurement of Liabilities in IAS 37, issued January 2010 and currently being deliberated. In our prior comment letter, we referenced IASB standards,

and we proposed that FASB look to the IASB standards as a way to achieve the objectives of the proposed Exposure Draft while promoting convergence in domestic and international accounting disclosure standards. The issuance of the Exposure Draft "as is" could negatively impact the FASB goal of international convergence, which is being driven by the same investors the immediate Exposure Draft is intended to benefit. We recommend that FASB work together with IASB on a collaborative solution regarding loss contingencies, which would necessarily mean that FASB not proceed with the content or timing of the proposed Exposure Draft.

We appreciate your consideration on these matters. We would be happy to discuss further. Please feel free to contact me at 316-828-6486.

Kind regards,



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