

ASSOCIATION OF AMERICAN RAILROADS 425 3rd Street, SW, Suite 1000 Washington, D.C. 20024

Daniel Saphire Assistant General Counsel Phone: (202) 639-2505 Fax: (202) 639-2868 E-Mail: dsaphire@aar.org

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Russell G. Golden Technical Director Financial Accounting Standards Board 401 Merrit 7 P.O. Box 5116 Norwalk, CT 06856-5116

File Reference No. 1840-100

Re: Proposed Accounting Standards Update; Contingencies (Topic 450), Disclosure of Certain Loss Contingencies

Dear Mr. Golden:

Attached please find the comments of the Association of American Railroads on the Proposed Accounting Standards Update, Disclosure of Certain Loss Contingencies.

Sincerely,

Daniel Saphire

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Attachment

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS ON THE PROPOSED ACCOUNTING STANDARDS UPDATE; DISCLOSURE OF CERTAIN LOSS CONTINGENCIES (TOPIC 450); File Reference No. 1840-100

The Association of American Railroads (AAR) submits these comments on the updated Exposure Draft of the Proposed Statement of Financial Accounting Standards regarding Disclosure of Certain Loss Contingencies, issued by FASB on July 20, 2010. AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. 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.

AAR submitted comments on behalf of its members in response to the proposed amendments that were released in July 2008. The 2010 Exposure Draft addresses some of the concerns raised by AAR at that time. However, the current Exposure Draft continues to raise some areas of concern and in other areas would benefit from clarification.

Materiality: The Exposure Draft requires disclosure of loss contingencies that are at least reasonably possible (450-20-50-1C), as well as remote loss contingencies that may subject an entity to a "severe impact." Severe impact is described as a higher threshold than material. The implication is that detailed individual (non-aggregated) disclosures of non-remote loss contingencies are required only if a materiality threshold is met. However, the operative disclosure

AAR members include Anacostia Rail Holdings; BNSF Railway Company; Canadian National Railway; Canadian Pacific Railway; CSX Transportation; Genesee & Wyoming; Iowa Interstate Railroad; Kansas City Southern Railway; METRA; National Railroad Passenger Corporation (Amtrak); Norfolk Southern; Union Pacific Railroad; Vermont Railway; Watco Companies; and Wheeling & Lake Erie Railway.

requirements do not expressly include a materiality threshold for individual disclosures. In addition, Example 3 Illustrative Disclosure includes a sample disclosure for a lawsuit that at most presents the possibility of a \$125,000 loss – a figure that would be immaterial for most, if not all, public companies. For the avoidance of any doubt, it would be helpful to qualify the disclosure requirements as applying to only material loss contingencies, e.g., parts 450-20-50-1C and 450-20-50-1F.

Aggregation: The Exposure Draft permits disclosures of classes of similar contingencies that may not be material individually but may be material in the aggregate. The intent appears to be to permit companies a reasonable degree of discretion in aggregating loss contingencies. However, the comments in Section 450-20-55-1A suggest limitations on a company's ability to aggregate litigation contingencies (factors such as jurisdiction and timing of the expected cash flows) that raise questions about the ability of companies to aggregate other than into extremely narrow categories. Such restrictions could result in voluminous disclosure of numerous categories of litigation for some companies, which may effectively bury the information most important to shareholders. In addition, there will be a heavy burden on auditors to review a company's choice of categories for aggregation based on the requirements of the rule. The comments should be revised to emphasize a company's discretion to aggregate loss contingencies based on their reasonable judgments about their litigation inventory and relevant business circumstances, specifically by removing the restrictive language found in the last two sentences of Section 450-20-55-1A. The requirement that companies disclose the basis for the aggregation should assure that aggregation is done at a meaningful and appropriate level.

Tabular Reconciliation: Paragraph 450-20-50-1F(g) requires a tabular reconciliation by class of loss contingencies from the prior period to the current

period which includes separate line items related to increases and decreases for changes in estimates for loss contingencies recognized in prior periods. It is unclear how the guidance should be applied to classes of claims for which the liability and ultimate expense projections are estimated and recorded using standard actuarial methodologies. Under standard actuarial methodologies, large numbers of similar type claims are grouped together and ultimate losses are projected based on reported losses, paid losses, or a combination of reported and paid losses at a summarized level. Detail regarding individual claim increases and decreases is not available. The proposed guidance requiring separate line items in the reconciliation table for increases and decreases for changes in estimates for loss contingencies recognized in prior years does not appear operational for actuarially developed estimates.

Disclosure Requirements: The disclosure requirements call for disclosure of the amount of damages claimed by plaintiffs. 450-20-50-1F(e)(1). While such assertions are generally part of a public document, the Exposure Draft should allow for flexibility in this area. In many cases, no specific damages request is made in the complaint. 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). In others, the asserted damage claim is an exaggerated figure for which there is no realistic basis. Railroads also have large numbers of outstanding claims for which no suit has yet been filed and consequently no public information on alleged damages is available. Particularly where a class of cases is aggregated, there may be no meaningful way to determine and disclose the total amount of damages claimed by the plaintiffs.

In those situations, a better approach would be to permit, in lieu of disclosures of the amount claimed by the plaintiff, companies to utilize an approach

based on both a sampling of publicly available information and a company's experience in resolving the class of cases and claims. This would likely be given as a range, as greater specificity would be difficult given the unpredictability of litigation. This approach would provide more realistic information to users of financial statements and would be more administratively feasible for issuers. This approach would also avoid the need for auditors to have access to privileged information, such as case evaluations, on individual matters, thus avoiding the possibility of privilege waiver.

In addition, AAR strongly believes the Exposure Draft should retain an exemption from disclosure of prejudicial information. This is particularly necessary where an individual contingency rises to the level of materiality, in which case the required disclosures may put the entity in a disadvantaged litigation position by enabling the opposing party to discern sensitive information. Where revealing otherwise required information is likely to lead to such prejudice, a full description of the matter and an analysis of whether the outcome is likely to have a material or severe impact on the company's financial position, results of operations, or liquidity should be sufficient.

Example 3, which is provided as an illustrative disclosure, suggests disclosures related to litigation developments at a level of detail that would be extremely burdensome. It simply is not realistic to expect such a level of detail, particularly for companies that are involved in large volumes of material litigation at any given time. The Exposure Draft should be clarified to make it clear that enhanced disclosures required after the initial stages of litigation need only include events that are likely to have a substantial impact on the outcome of the litigation. Where classes of individually non-material contingencies are aggregated, disclosures of this nature, in addition to being burdensome, would be impractical and would not provide meaningful information to users of financial statements. AAR

assumes that in situations where classes of loss contingencies are aggregated FASB's intent is not to require qualitative disclosures of the nature described in section 450-20-50-1F(b), but instead that generic descriptions that adequately describe the aggregated class of cases would suffice.

Additionally, paragraph 450-20-55-1D states that if an entity provides disclosures on an aggregated basis, an entity should consider disclosing in a roll-forward the total number of claims outstanding, the average amount claimed and the average settlement amount. Aggregation in too narrow categories would enable opposing parties to discern sensitive information that could set expectations for settlement values on the part of opponents. Having reasonable discretion in the level of aggregation for disclosure would provide sufficient protection against such adverse impacts.

Finally, AAR is concerned that the proposed effective date of the Exposure Draft—fiscal years ending after December 15, 2010—would not provide sufficient time for its members to comply. As drafted, the proposal will significantly increase disclosure requirements and create additional administrative burdens on reporting entities that will need to develop methods for tracking and aggregating contingencies, as well as internal control mechanisms for disclosures. This will be particularly problematic for entities which face a large number of contingencies. Therefore, the effective date of the new guidance should be extended by at least one year.