

September 20, 2010

## **VIA ELECTRONIC MAIL**

Mr. Russell Golden Technical Director Financial Accounting Standards Board 401 Merritt 7, P.O. Box 5116 Norwalk, Connecticut 06856-5166

Re: Disclosure of Certain Loss Contingencies - File Reference No. 1840-100

Dear Mr. Golden:

We appreciate the opportunity to comment on the Financial Accounting Standards Board's ("FASB") Exposure Draft of the Proposed Accounting Standards Update relating to the disclosure of certain loss contingencies (the "Proposal"). While we support FASB's efforts to improve loss contingency disclosure, we do not believe that the Proposal as drafted will achieve its primary objective of enabling financial statement users to better assess the likelihood, timing and amount of future cash flows associated with loss contingencies. Furthermore, we are concerned that compliance with certain of the required disclosures is likely to prejudicially impact a company's litigation posture and substantially jeopardize confidentiality privileges. The following expresses our primary concerns in greater detail.

## 1. Disclosure of the Accrual Amount for Loss Contingencies

If adopted as drafted, the Proposal would require, for each reporting period, disclosing the amount accrued for loss contingencies,<sup>2</sup> and a tabular reconciliation evidencing changes relative to prior period accruals.<sup>3</sup> By contrast, the current standard requires disclosing accruals only if necessary to prevent the financial statements from being misleading. We believe that the existing requirement adequately provides financial statement users with meaningful information regarding management's determination of the impact of a loss contingency, and should therefore be retained.

Requiring disclosure of individual accruals for each probable loss contingency, in the absence of any suggestion that this disclosure is necessary to prevent the financial statements from being misleading, would be highly prejudicial to a reporting company. Specifically, disclosing accruals for litigation may expose management's confidential cost and liability assessments to adverse litigation parties, and misrepresent those assessments as a company's internal good faith estimate of its liability. As a result, the accruals would effectively set a floor for settlement, drastically impairing a company's ability to negotiate a settlement that is beneficial to its shareholders. The proposed tabular reconciliation requirement would aggravate this prejudice, by exposing management's assessment of the litigation's progress and providing plaintiffs' attorneys with periodic updates regarding a company's defense strategy and its hopes of succeeding at trial or negotiating a settlement that is beneficial to its shareholders.

<sup>&</sup>lt;sup>1</sup> Exposure Draft, *Proposed Accounting Standards Update – Disclosure of Certain Loss Contingencies*, File Reference No. 1840-100 (July 20, 2010)

<sup>&</sup>lt;sup>2</sup> Paragraph 450-20-50-1F.e.2.

<sup>&</sup>lt;sup>3</sup> Paragraph 450-20-50-1F.g.

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While we appreciate FASB's attempt to mitigate the proposed disclosures' prejudicial effects by allowing certain loss contingencies to be aggregated by class, the Proposal's aggregation standards, as drafted, still do not offer adequate protection. For example, the Proposal notes that it may be inappropriate to aggregate individual litigations with class actions or to aggregate items with different anticipated cash outflow timings. Furthermore, companies with few litigation matters will not benefit from aggregation, nor will those where one or two significant litigation matters dominate the aggregated group and corresponding disclosure. These limitations suggest insufficiency and impracticality of the aggregation standards, increasing the risk that accrual changes will be obvious to plaintiffs' attorneys, damaging a defendant's ability to negotiate a fair settlement. If the proposed quantitative disclosure requirements are adopted, companies should be permitted to aggregate accrual information on an overall basis, rather than on a class basis, to reduce the adverse impact to a company's litigation posture.

Finally, we respectfully disagree with the proposed disclosure threshold adjustment to include "remote" loss contingencies that may have a "severe impact," as this requires immense speculation regarding the potential impact of events that are, in fact, unlikely to occur. We find this requirement to be inconsistent with the securities laws materiality standard, which requires assessing both the probability of an event's occurrence along with the magnitude of its impact. Supplanting this standard with a standard requiring the disclosure of remote events, even those that may introduce a severe impact, would not, in our view, yield meaningful disclosure and may ultimately detract from the utility of financial statements.

## 2. Risk of Privilege Waiver

While we appreciate FASB's intentions in the Proposal that the enhanced disclosure requirements not jeopardize attorney-client privilege or the attorney work-product doctrine, both protections are inherently threatened by the proposed accruals disclosures. Assessing liability for certain loss contingencies is highly subjective, and the proposed enhanced disclosures would likely deprive auditors of concrete, objective evidence on which to rely and would cause them instead to rely heavily on management's judgment and representations, as advised by internal and external counsel and other experts. Attorneys and other experts may be unable (due to privilege or confidentiality concerns) or unwilling (due to professional standards and liability considerations) to provide the incremental evidence required by auditors to satisfy their documentation requirements. As a result, the proposed disclosure requirements may force a company to weigh the risk of privilege waiver against the impact of receiving an audit opinion laden with qualifications and disclaimers.

## 3. Exemption for the Disclosure of Prejudicial Information

In the event FASB adopts the Proposal substantially in its current form, we advocate the inclusion of an explicit exemption for the disclosure of prejudicial information. The exemption should encompass circumstances in which, due to the number or nature of a company's contingencies, it will not be adequately protected by aggregation, and for disclosure that could result in a waiver of the attorney-client privilege or work-product protection. Such an exemption would help ensure that financial statement users receive constructive information without compromising a company's ability to negotiate settlements, protect confidential information and preserve shareholder value.

For the foregoing reasons, we are concerned that the Proposal as drafted may result in cumbersome disclosure that is not particularly meaningful, accurate, prognostic or material. We kindly urge FASB to reconsider the Proposal to facilitate disclosure that is useful to investors without unduly prejudicing reporting companies.

Thank you for your consideration.

Sincerely,

AMERICAN TOWER CORPORATION

<sup>&</sup>lt;sup>4</sup> Paragraph 450-20-55-1A.

<sup>&</sup>lt;sup>5</sup> Paragraph 450-20-50-1D.