ASCENSION HEALTH

1840-100
Comment Letter No. 277
4600 Edmundson Road
Saint Louis, Missouri 63134-3806

Post Office Box 45998
Saint Louis, Missouri 63145-5998

Phone: 314-733-8000
www.ascensionhealth.org

September 20, 2010

Russell G. Golden
Technical Director
File Reference No. 1840-100
Financial Accounting Standards Board
401 Merritt 7
P.O. Box 5116
Norwalk, Connecticut 06856-5116

Re: Proposed Accounting Standards Update, *Disclosure of Certain Loss Contingencies*

Dear Mr. Golden:

Ascension Health welcomes the opportunity to comment on the Financial Accounting Standard Board's (the "Board") Proposed Accounting Standards Update, "*Disclosure of Certain Loss Contingencies*," exposed for comment on July 20, 2010 (the "Draft"). We provide our comments on behalf of Ascension Health, the nation's largest not-for-profit health care system, with annual operating revenues of over $14 billion and approximately $4.1 billion in tax-exempt debt in public markets.

Our organizational structure consists of hundreds of separate legal entities, primarily non-profit hospitals and healthcare entities (with a few for-profit entities), located in 20 states and the District of Columbia. Our legal entities are organized into approximately 30 reporting units for financial statement reporting purposes, each of which receive some level of external audit review. Furthermore, certain of these reporting units receive separate audit reports, either on a consolidated basis or on a stand-alone hospital basis based on regulatory requirements. For the most recent fiscal year, over 30 full scope and limited scope audit reports will be issued within our System. Additionally, we file interim quarterly statements publicly via the Municipal Securities Rulemaking Board's Electronic Municipal Market Access system. [1]

Our system self insures certain business risks, including those of a professional and general liability nature as well as workers compensation, via large centralized in-house risk management programs. Furthermore, Ascension Health also has a well-established corporate compliance program, the primary purpose of which is to ensure the highest level of business and professional standards of conduct, compliance with federal, state

[1] Ascension Health is a publicly traded company, as a conduit bond obligor for conduit debt securities traded in a public market, as defined within the Financial Accounting Standards Board's Accounting Standards Codification.

and local laws and prevention and early detection of potential organizational and employee misconduct. [2]

Although Ascension Health recognizes the need to provide investors and other users of financial information with adequate and timely information with respect to loss contingencies, we believe that several aspects of the Draft are problematic and should be revised. As described below, we have significant concerns that the requirements proposed within the Draft will heighten the probability that attorney-client privilege will be waived. We also believe the proposed disclosures may mislead the public by magnifying the monetary exposure of particular risks. Furthermore, the Draft's proposed disclosures will potentially expose reporting entities to legal risks they do not currently bear.

We agree with the following concerns other responders have expressed about issues inherent in the current Draft, which we will not reiterate in this letter:

- The potential exposure of attorney work product;
- The difficulty and subjectivity in distinguishing between contingencies that are remote and contingencies that are reasonably possible;
- The necessity of disclosing potential litigation losses that would be covered by insurance as though there were no insurance coverage; and
- Disclosing the amount accrued for a particular item of litigation, which will tend to set a floor on the amounts for which plaintiffs will be willing to settle.

In response to Question 4 of the Draft, we do not believe the proposed effective date is operational, and respectfully request the Board to establish a more reasonable implementation date for all entities, which would provide all entities at **least** one full year to adequately prepare to make any additionally required disclosures. The current proposed date would require Ascension Health to adopt the provisions of the final Accounting Standards Update during its current fiscal year, of which approximately three months have already elapsed. Based on the significantly enhanced data collection processes we anticipate having to implement in order to meet the requirements of the proposed standard, in consideration of the size of our organization as described above, any amount of time less than at least one year would not provide the requisite time we feel would be required to adopt the Update.

In the remainder of this letter, we will address three key concerns with the Draft that we strongly urge the Board to consider. These issues are discussed below:

1. The expanded disclosures widen the possibility that attorney-client privilege may be waived and that attorneys will be called upon to make arbitrary estimates of potential loss.

In 1975, the American Bar Association issued a "Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information" (the "Statement"). The Statement

[2] Ascension Health's Corporate Compliance Program was developed using elements of a Corporate Compliance Program established by the Office of Inspector General of the U.S. Department of Health and Human Services

provides guidance to attorneys for responding to inquiries from auditors (usually independent accounting firms) about litigation claims and loss contingencies, further details of which are discussed below. As other responders to the Draft have also noted, we do not believe the proposed disclosures balance the need to provide more transparency in loss contingency disclosures with the need to protect attorney-client communications. We do not feel the requirements of the Statement were considered in light of the disclosures being proposed, and in fact, are in contrast to the guidance of the Statement.

We believe that the Statement is appropriately cautious and restrictive. The Preamble of the Statement begins:

> The public interest in protecting the confidentiality of lawyer-client communications is fundamental.... [T]he objective of fair disclosure in financial statements is more likely to be better served by maintaining the integrity of the confidential relationship between lawyer and client, thereby strengthening corporate management's confidence in counsel and encouraging its readiness to seek advice of counsel and to act in accordance with counsel's advice.... [I]t is not in the public interest for the lawyer to be required to respond to general inquiries from auditors concerning possible [litigation] claims.

The Statement cautions, "Lawyers should bear in mind, in evaluating claims, that an adverse party may assert that any evaluation of potential liability is an admission." (Statement, Paragraph (1)(c).) Moreover, attorneys should avoid estimating litigation outcomes for auditors except when the cases are very strong or very weak because that is outside the proper role of legal counsel:

> In view of the inherent uncertainties, the lawyer should normally refrain from expressing judgments as to outcome except in those relatively few clear cases where it appears to the lawyer that an unfavorable outcome is either "probable" or "remote" .... Therefore, it is appropriate for the lawyer to provide an estimate of the amount or range of potential loss (if the outcome should be unfavorable) only if he believes that the probability of inaccuracy of the estimate of the amount or range of potential loss is slight.... The lawyer should not be asked, nor need the lawyer undertake, to furnish information to the auditor concerning loss contingencies except as contemplated by this [Paragraph].

(Ibid., Paragraph 5.) The Statement describes precautions that should be taken so that, in the process of responding to inquiries from auditors, attorneys do not waive attorney-client privilege, which, the Statement stresses, attorneys are ethically bound to uphold. (Commentary on Paragraph 1.)

Auditors are charged with, among other things, finding evidentiary support for information that is revealed in financial statements. The significant additional disclosures in the Board's proposal establish a highly concerning dynamic. The greater the requirement for additional disclosures, the greater will be the demand from auditors to test quantitative analyses used to develop those disclosures, and the greater the potential

that privileged information (especially as to litigation) will be disclosed to auditors, resulting in the loss of privileged status.

For example, for reasonably possible contingencies, the Draft calls for disclosing "[q]ualitative information to enable users to understand the loss contingency's nature and risks," "the possible loss or range of loss" if it can be estimated, and, if an estimate is impossible, the reason why. (Sections 450-20-50-1Fa., 450-20-50-1Fe.2., and 450-20-50-1Fe.3.) That information can be derived only with the assistance of legal counsel. The demand for this information makes the attorney a central figure in reporting loss contingencies, compels the attorney to estimate potential losses in ways that the Statement counsels against, and creates new hazards for the inadvertent disclosure of information formerly protected by attorney-client privilege.

2. Damage claims reported under the new requirements may give a misleading impression.

Sections 450-20-50-1Fb. and 450-20-50-1Ff. of the Draft would require disclosing "the amount of damages claimed by the plaintiff" (whether or not claimed publicly) in contingencies that are judged to be, respectively, reasonably possible and remote. This information would often give a misleading impression of the gravity of the litigation and the anticipated award of damages. The Board's discussion of the "Disclosure Threshold" in the Draft recognizes that damages claimed in a lawsuit often serve a strategic purpose and have no factual bearing on the case: "A plaintiff's amount of damages claimed ... may be frivolous with an artificially inflated amount." (Background Information and Basis for Conclusions, paragraph BC14.)

We are of a strong opinion that nothing will be gained, for investors or other users of financial statements or for the entity providing the disclosures, from having to disclose what all too often are intentionally overinflated estimates of recovery. We recommend that the requirement to make such disclosures be removed.

3. Certain proposed disclosures may disadvantage the reporting organization in pending litigation, encourage the filing of new litigation, and discourage settlements.

"[T]he goal [of financial reporting] is financial information useful in making decisions about providing resources to an entity ...." ("Rules of Procedure" (Financial Accounting Standards Board: May 1, 2010), at 2.) Seven principles guide the Board in establishing accounting standards. Two of them are:

> 1. *To be objective in its decision making* and to ensure, insofar as possible, the neutrality of information resulting from its standards. To be neutral, information must report economic activity as faithfully as possible without coloring the image it communicates for the purpose of influencing behavior in any particular direction.
>
> ....
>
> 3. *To issue standards only when the expected benefits exceed the perceived*

costs....

(Ibid. at 4 (emphasis in original).)

The Draft's proposed disclosures are perceived to be in contrast to these principles: certain disclosed information can be reasonably expected to influence behavior in particular directions, and we believe the costs to implement the requirements would far exceed the benefits, from a perspective of promoting meaningful and accurate financial reporting.

These weaknesses are particularly evident in the impact the proposed disclosures are likely to have on litigation. Section 450-20-50-1C provides:

> An entity shall disclose information about a **contingency** if there is at least a reasonable possibility (that is, more than **remote** possibility) that a loss may have been incurred regardless of whether the entity has accrued for such a loss (or any portion of that loss). Disclosure is not required of a loss contingency involving an unasserted claim or assessment if there has been no manifestation by a potential claimant of an awareness of a possible claim or assessment unless both of the following conditions are met:
>
> a. It is considered probable that a claim will be asserted.
> b. There is a reasonable possibility that the outcome will be unfavorable.

(Emphasis in original.) This "Disclosure Threshold" requires an entity to disclose a loss contingency in its financial statements in certain cases even if no claim has been asserted by a third party. Such a disclosure would be tantamount to an admission that the entity anticipates a suit will be filed, which it may lose (or be compelled to settle). Even if this disclosure is inadmissible as a recognition of liability in court, it would serve as a clear communication to potential plaintiffs and their attorneys to assert a claim by filing suit.

As the litigation progresses, the defending entity would be required to reassess and report its chances of losing in each successive reporting period. Section 450-20-50-1Fb. states:

> During early stages of asserted litigation contingencies, [an entity must disclose], at a minimum, the contentions of the parties .... In subsequent reporting periods, disclosure shall be more extensive as additional information about a potential unfavorable outcome becomes available, for example, as the litigation progresses toward resolution, if the likelihood or magnitude of loss increases, or both. Furthermore, if known, an entity shall disclose the anticipated timing of, or the next steps in, the resolution of individually material asserted litigation contingencies.

This requirement would put a defending entity in the precarious position of having to admit, if necessary, that its chances of losing were greater than they were before or that the amount of damages is likely to be higher than previously predicted. Plaintiffs and their attorneys may use such disclosures either to persevere in what they may have

regarded as doubtful cases or to eschew offers of settlement they would otherwise have entertained.

The result is that the proposed disclosures could significantly impact the system of justice and severely upset the delicate balance between plaintiff and defendant that is a hallmark of the rule of law.

Other provisions governing greater-than-remote contingencies in the proposed requirements reinforce the impact that the standards would have on litigation. Section 450-20-50-1Fe., for example, provides for the disclosure of:

> 1. Publicly available quantitative information, for example, in the case of litigation contingencies, ... the amount of damages indicated by the testimony of expert witnesses ....
> 5. Information about possible recoveries from insurance and other sources only if, and to the extent that it has been provided to the plaintiff(s) in a litigation contingency, it is discoverable by either the plaintiff or a regulatory agency ....

The first type of disclosure could influence when expert witnesses are called to testify and, in particular, speed up the calling of the defense's expert witness to rebut the plaintiff's witness. The second type of disclosure would publicize sensitive insurance information that normally would not be publicized. This information may lead to more cases being filed, with the knowledge that the claims would be covered by insurance.

To summarize, these elements of the Draft's proposed disclosures would impede an even-handed administration of justice and, in particular, disadvantage entities that are defending themselves, or that may be required to defend themselves, in litigation.

Conclusion

In summary, we believe that the primary issues inherent in the Draft are not whether the proposed standards, if issued, would be "operational" or the "disclosures auditable," as evidenced by the Questions the Board is requesting respondents to comment on, or even whether the new standards would, in the abstract, enhance disclosures. In contrast, we believe the central issues are (1) whether the disclosures being considered would be useful to potential or actual investors of the entity making the disclosures, (2) whether the disclosure of privileged and confidential information is more likely under the new standards, (3) whether the proposed disclosures would have the unfortunate effect of encouraging new litigation and, in select cases, of making plaintiffs more persistent in prosecuting their claims, and (4) whether the presumed benefits of the new standards of disclosure will outweigh the harmful effects they are likely to have.

In light of the foregoing and our comments above, we do not believe that the goals the Board envisions with respect to loss contingencies will be met by the Draft's proposed disclosures, and that only potentially harmful effects would ensue to the reporting entity from a legal perspective. Disclosures should not come at the price of harming the reporting entity. Accordingly, we strongly urge the Board to reconsider the disclosures

being proposed, that would, at a minimum, eliminate substantially all risk of waiving attorney client privilege and providing potentially harmful and misleading loss contingency information.

Sincerely,

Juli K. Shields
Vice President – Legal Services and Associate General Counsel

Elizabeth C. Foshage
Vice President - Finance

996915v.3