



LETTER OF COMMENT NO. 206

## STANDARD PACIFIC HOMES

August 8, 2008

### VIA E-MAIL

Technical Director  
Financial Accounting Standards Board  
4010 Merritt 7  
P.O. Box 5116  
Norwalk, CT 06856

*Re: Comments concerning proposed expansion of disclosures about certain loss contingencies in the scope of FASB Statements No. 5, Accounting for Contingencies and 141 (revised 2007), Business Combinations.*

Members of the Financial Accounting Standards Board:

Thank you for the opportunity to comment on the Board's proposed expansion of disclosures about certain loss contingencies in the scope of FASB Statement No. 5, *Accounting for Contingencies* and 141 (revised 2007), *Business Combinations*. We are responding on behalf of Standard Pacific Corp. Standard Pacific is one of the nation's largest public homebuilders. The Company has built homes for more than 100,000 families during its 42-year history. Standard Pacific constructs homes within a wide range of price and size targeting a broad range of homebuyers. The Company operates in many of the largest housing markets in the country with operations in major metropolitan areas in California, Florida, Arizona, the Carolinas, Texas, Colorado and Nevada. Standard Pacific also provides mortgage financing and title services to its homebuyers through its subsidiaries and joint ventures, Standard Pacific Mortgage, Inc., SPH Home Mortgage and SPH Title.

Standard Pacific believes that users of financial statements are best served under the current version of FASB Statement No. 5, without any of the proposed changes. Additionally, the proposed changes would unfairly prejudice companies and their investors in favor of plaintiffs and their counsel. The following aspects of the proposed changes are most troubling.

- 1. The Proposed Rule Would Impermissibly Infringe Attorney Work Product Protections.** State and Federal laws protect lawyers' abilities to provide effective representation to clients by encouraging thorough investigation of actual and pending claims, and protecting lawyers' research and analysis from discovery by the clients' opponents. California law provides, for example:

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It is the policy of the state to do both of the following:

- (a) Preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases.
- (b) Prevent attorneys from taking undue advantage of their adversary's industry and efforts.

*Cal. Civ. Proc. Code §2018.020.*

To accomplish these important goals, California law mandates that:

- (a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.
- (b) The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.

*Cal. Civ. Proc. Code §2018.030.*

Federal and other state laws afford similar protections, for good reason. See, e.g. FED. R. CIV. PROC. 26(b)(3).

The proposed rule would render these important laws ineffectual by requiring companies to divulge the results of their legal counsel's protected investigations and their critical legal analysis.

The new proposed rule attempts to minimize this prejudice to companies by allowing them to aggregate data. However, this often will not be effective, as the Board recognizes when it states that some categories of information may be entirely excluded if aggregating data will still be prejudicial. The problem is that the rule goes on to state that certain categories of information may never be excluded. These categories go to the heart of the attorney work product doctrine. Even with the exceptions, FASB's new proposed rule would undermine hundreds of years of sound legal precedent. Under the new rule, companies would publish the following (categories of prejudicial information that may not be excluded are in bold):

- i. Lists of pending and potential claims, including the identity of various claims that the Company fears and expects will be asserted (for the reasons set forth below in Item 2, implicit in such lists is an admission by the company that the likelihood of losses from such claims is more than remote).
- ii. **The amount sought, or for unasserted or unspecified demands, the company's internal valuation of the maximum loss potential for each actual or potential claim.**

- iii. A description sufficient to enable users (and opposing counsel) to understand the Company's evaluation of the risk posed.
- iv. A description of how the claim or potential claim arose (presumably including a summary of the company's potentially actionable behavior).
- v. A description of the company's view concerning the legal basis for the claim.
- vi. The company's perception of the current status of the claim or potential claim and the timing for resolution.
- vii. A description of the factors likely to affect the ultimate outcome, along with their potential effect.
- viii. The Company's qualitative assessment of the most likely outcome.
- ix. Any significant assumptions in estimating the company's internal valuation and assessment of the most likely outcome.
- x. A qualitative and quantitative description of the company's insurance or indemnification rights for such claim or potential claim.

It is hard to imagine a more prejudicial risk management edict for public companies. Even where companies can aggregate data or withhold limited categories of information, the new proposed rules would hand over to plaintiffs' lawyers' critical, protected legal information.

2. **The Reporting Threshold for All But "Remote" Claims Is Too Low**--Under the current rule, companies must report on loss contingencies if there is at least a "reasonable possibility" of a loss. This is a fair limitation, as it does not invite speculation concerning unlikely claims or losses. This is important because predicting the outcome of litigation is inherently difficult and unscientific. Case evaluations are subject to frequent change as matters progress. They are therefore unreliable and potentially misleading.

The proposed rule would change the reporting threshold to require disclosures about claims, including unasserted claims, where the potential for loss is anything but "remote." Under this approach, companies would by definition be required to publish fulsome details concerning their assessment of even unlikely losses, and engage in speculative guesswork about potential claims that have yet to be asserted.

These disclosures would be inherently uncertain and unscientific and could potentially serve as a basis for new claims for misrepresentation and securities fraud. These claims would allege with the benefit of 20/20 hindsight that the companies' earlier reports about various claims either under or over-stated the actual risk.

To avoid such potential liability, companies may resort to over-reporting the potential risk for loss contingencies that may or may not be remote, and providing "watered down" descriptions. Such information would be less useful to users of financial reports. It may actually become more difficult to assess the actual, anticipated severity and likelihood of many loss contingencies.

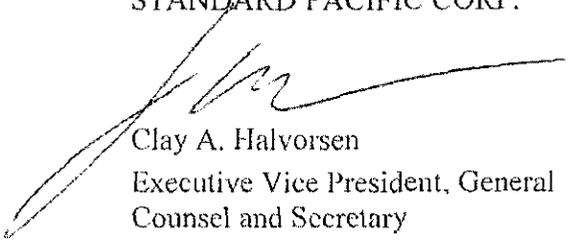
3. **Reporting the Demand or the Company's Valuation in Each Claim Would Be Unfair and Misleading.** The proposed rule would require companies to report the amount claimed, or if this is not specified, their best estimate of the maximum exposure to the loss. This is problematic for a number of reasons.
- a. The amount claimed may bear little relationship to the level of actual risk. Demand letters and legal complaints often are inflated for strategic reasons. In such cases, reporting the amount claimed would be misleading. It also would encourage plaintiffs to assert larger claims to gain leverage over companies forced to publish their allegations.
  - b. In many court actions, such as tort claims, plaintiffs merely claim "damages according to proof." Requiring the Company to quantify each such claim would require significant work, and encroach on attorney work product, as described above in Item No. 1.
  - c. Qualifying the amount claimed by providing a maximum exposure to the loss also would be misleading. The maximum loss exposure often bears little relation to the actual anticipated exposure. Allowing an entity to disclose its best estimate of the possible loss or range of loss is not a sufficient solution to this problem. First, as mentioned above, requiring companies to publish such assessments would infringe attorney work product. Second, as also mentioned above, this would increase the companies' potential risk from new claims under the theory that they under or over estimated highly uncertain loss contingencies.
  - d. In providing quantitative descriptions, companies would be prohibited from relying on anticipated insurance recoveries. This is counter to the purpose of insurance, which protects against the severity of a wide array of actual or potential claims where losses may or may not be remote. Companies should be permitted to factor into their reporting on loss contingencies the anticipated impact of insurance.
  - e. Aggregating the maximum exposure on each claim would produce staggeringly high, and totally unrealistic risk projections. The amount demanded or maximum potential loss contingency for a case will usually be many multiples of the actual risk. Accordingly, it would be misleading and inaccurate to report to users the aggregate maximum exposure for all claims and likely potential claims. Although the new rule would appear to allow companies to qualify such an aggregate report by providing a range of anticipated outcomes, the grossly excessive maximum figures must still be reported. Moreover, qualifying each demand or maximum potential loss would be risky as it could engender claims for misrepresentation if the estimates prove inaccurate.
4. **The Proposed Rule Does Not Provide Sufficient Clarity Regarding What Items Are Material.** The Proposed Rules states that: "The provisions of this Statement need not be applied to immaterial items." It is unclear whether this statement applies to claims that are immaterial on a collective or individual basis. This statement

should be clarified to exclude the requirement to report on loss contingencies that are individually immaterial.

Standard Pacific believes that the proposed changes are misguided. The heightened and more detailed reporting requirements concerning pending and potential claims will not provide more useful information and may result in highly speculative and potentially misleading disclosures.

Sincerely,

STANDARD PACIFIC CORP.



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