



LETTER OF COMMENT NO. 25

August 1, 2008

Submitted via email (director@fasb.org)

Director of Major Projects and Technical Activities  
Financial Accounting Standards Board  
401 Merritt 7  
PO Box 5116  
Norwalk, CT 06856-5116

**Re: File Reference No. 1600-100**

We appreciate the opportunity to comment on the Financial Accounting Standards Board's ("Board's") loss contingency exposure draft. While we support the Board's goal of improving the usefulness of financial information that is disclosed to investors and recognize the level of effort the Board has put into this proposal, we do not think that the proposal would achieve its stated objectives. We are not aware of a significant void in the current disclosure process that this standard would address. We acknowledge that there may be diversity in practice in applying FASB Statement No. 5 – Accounting for Contingencies ("SFAS 5"); however, it is our opinion that SFAS 5 represents a principle-based standard. The current direction of the Board is to converge with IFRS and focus on principle-based standards. We do not believe this proposal is within the spirit of that goal, and suggest that any change to SFAS 5 instead be issued as a joint standard.

We would be happy to further discuss our views and comments with the FASB members or its staff.

Sincerely,

Thomas W. Sweet  
Vice President, Chief Accounting Officer  
Dell Inc.

Laura J. Coleman  
Vice President, Litigation  
Dell Inc.

## ATTACHMENT:

*1. Will the proposed Statement meet the project's objective of providing enhanced disclosures about loss contingencies so that the benefits of those disclosures justify the incremental costs? Why or why not? What costs do you expect to incur if the Board were to issue this proposed Statement in its current form as a final Statement? How could the Board further reduce the costs of applying these requirements without significantly reducing the benefits?*

No. We do not believe these proposed changes will provide enhanced, useful disclosures about loss contingencies that justify the increased costs, burdens and risks associated with these proposed rules. It is our understanding that the Board is proposing these rule changes due to concerns expressed by financial statement users that the current standard, "do[es] not provide adequate information to assist users of financial statements in assessing the likelihood, timing, and amount of future cash flows associated with loss contingencies." Even with full access to outside and inside counsel opinions regarding litigation, management is also highly challenged to adequately assess the likelihood, timing and amount of future cash flows in light of litigation contingencies. This is not the result of any failure of the existing rule, but rather due to the very nature of litigation and the vast number of variables involved in assessing any probable loss. Such variables include but are not limited to: jury trial vs judge, jurisdiction, prejudicial climate (in the case of juries), political climate (election years on certain issues), aggressiveness of plaintiff, strength of plaintiff attorneys, merits of case, procedural defenses, legal defenses, chances of appeal, and how comparable cases involving others may have been resolved. All of these things are not prone to precise estimates and even with complete information, this would require judgment calls that are often contrary to actual final settlements or judgments. We suggest that the Board explore further with these investors for examples where they were not provided with sufficient information. It may be beneficial to investigate specific examples to see if in those instances companies were following the spirit of the existing principle-based rules by including all of the information required by the Securities and Exchange Commission and the relevant disclosure requirements of SFAS 5. Instead of a perceived deficiency in the rule, it may be worth considering if the current requirements are being fully complied with.

This standard would require disclosure if, "[t]he contingency or contingencies are expected to be resolved in the near term; and the contingency or contingencies could have a severe impact on the entity's financial position, cash flows, or results of operations" with the term "severe impact" being defined as, "...a significant financially disruptive effect on the normal functioning of an entity. Severe impact is a higher threshold than material."

This standard would require “disclosure of quantitative information about the entity’s exposure to loss from the contingency (including any amounts already recognized in the financial statements)...” If the entity believes the maximum exposure to loss is not representative of the entity’s actual exposure, this standard would allow disclosure of “best estimates of the possible loss or range of loss...” The standard requires the disclosure to either be by specific matter or in aggregate. This requirement could have a prejudicial and negative impact on the outcome of a case. At a minimum, to disclose this information by matter would provide the plaintiff with the company’s best estimate of the minimum amount owed, thus setting a floor for all future settlements. Thus, it is unlikely anyone will take this approach. Instead, all of the estimated amounts will be aggregated, which will not provide useful information and will result in the dollar amounts being disconnected from the robust verbal discussions of the cases.

Furthermore, we believe that even aggregate disclosure could be prejudicial and have a negative impact on the outcome of a case. For example, when there is only one case of a given type or when there is more than one but, due to the nature of the cases, it may be obvious to savvy plaintiffs’ attorneys which case we were referring to. Also, disclosing dozens of a given type of case does not provide additional clarity to financial statement users. Users could end up with extremely large dollar amounts with extremely broad ranges, thereby severely limiting the usefulness of the information and painting an inappropriately negative assessment of the company’s actual exposures and future uses of cash. This requirement would encourage companies to disclose a larger number of less significant litigation matters, making the disclosure longer and perhaps less useful to users than it is under the current rules.

Finally, in the qualitative disclosures, we would be required to disclose expected timing of resolution. Many impacts are outside the control of defendants as far as timing. These factors include court schedules, motions by plaintiffs, political elections, etc. In some instances, we receive a response or ruling from the court in only a few months, and in other instances it has taken years. We had one case that was dormant for 18 months, and then we received an unexpected negative judgment. A second case was dormant for 3 years before we received an adversarial ruling that prompted further settlement discussions. At the time, though, we had no idea that these cases would stagnate as long as they did so we would have likely made disclosures far in advance and potentially creating confusion and greater uncertainty.

*2. Do you agree with the Board’s decision to include within the scope of this proposed Statement obligations that may result from withdrawal from a multiemployer plan for a portion of its unfunded benefit obligations, which are currently subject to the provisions of Statement 5? Why or why not?*

Dell does not have any comment on this topic.

*3. Should an entity be required to provide disclosures about loss contingencies, regardless of the likelihood of loss, if the resolution of the contingencies is expected to*

*occur within one year of the date of the financial statements and the loss contingencies could have a severe impact upon the operations of the entity. Why or Why not?*

No. There is a substantial amount of litigation in today's world. Companies need to use their best judgment in making accounting accruals as well as appropriate disclosures to properly balance providing material information that is useful in the user's decision-making process instead of overloading end-users with information. Due to the volume of litigation, we are concerned that providing disclosure regardless of likelihood of loss would subject end-users to a large volume of information of limited qualitative value, especially in the case of many frivolous lawsuits. Due to the highly volatile nature of litigation, such disclosures could be little more than a statement of facts of the case and the plaintiff's demand. Plaintiff's demands are often highly inflammatory or grossly exaggerated, and ultimately result in resolution for only fractions of the dollar amounts claimed. The large volume of additional disclosure that these proposed rules would require would add little in the way of additional insights into the performance of the company or potential uses of company's assets. SEC Regulation S-X, Rule 4-01(a) states that the information required is to be regarded as a minimum requirement in the preparation of the financial statements, "to which shall be added such further material information as is necessary to make the required statements, in the light of the circumstances under which they are made, not misleading." We feel that Regulation S-X, Rule 4-01(a), combined with the current SFAS 5 requirements, when properly applied, should provide financial statement users with the appropriate level of disclosure.

In addition, we need to be clear to which loss contingencies the revised requirements would apply. FIN 45 has already defined disclosures for product warranties and other contractual guarantees. For example, we do not believe that further disclosure regarding estimates of possible ranges of losses for warranty obligations would be appropriate.

*4. Paragraph 10 of Statement 5 requires entities to "give an estimate of the possible loss or range of loss or state that such an estimate cannot be made." One of financial statement users' most significant concerns about disclosures under Statement 5's requirements is that the disclosures rarely include quantitative information. Rather, entities often state that the possible loss cannot be estimated. The Board decided to require entities to disclose the amount of the claim or assessment against the entity, or, if there is no claim or assessment amount, the entity's best estimate of the maximum possible exposure to loss. Additionally, entities would be permitted, but not required, to disclose the possible loss or range of loss if they believe the amount of the claim or assessment is not representative of the entity's actual exposure.*

*a. Do you believe that this change would result in an improvement in the reporting of quantitative information about loss contingencies? Why or why not?*

No. We do not believe this change would result in an improvement in the reporting of quantitative information about loss contingencies. The intent of financial reporting is to provide reliable and relevant information for financial statement users to assess the financial results, conditions, and cash flow prospects of companies. The information has to be "comprehensible to those who have a reasonable understanding of business...and

are willing to study the information with reasonable diligence.” The maximum exposure or demand amounts in today’s litigation do not represent reliable and relevant information. Claimed amounts are rarely, if ever, representative of actual amounts paid in resolution of the claim. Range estimates typically vary widely with large differences from the low to high ends due to the great uncertainty involved, and thus are unlikely to provide users with meaningful information. The proposed changes may even result in the investor being misled. We do not believe such information meets the standard for representational faithfulness set by Concept Statement 2.

*b. Do you believe that disclosing the possible loss or range of loss should be required, rather than optional, if an entity believes the amount of the claim or assessment or its best estimate of the maximum possible exposure to loss is not representative of the entity’s actual exposure? Why or why not?*

No. We do not believe one should be required to disclose the possible range of loss if the entity does not believe it is representative of the entity’s actual exposure. Ranges are highly unreliable, and a range for possible loss is likely to vary significantly from the low to high end. Furthermore, disclosing a possible range of loss is providing highly sensitive information to a legal opponent and would put a company at a significant disadvantage. It would be potentially harmful to a shareholder to provide information that could actually harm a company’s interests in that litigation or from a competitive standpoint in industry-wide disputes. Some cases may ultimately settle based on agreements regarding future behavior or other injunctive relief with no payment for past damages even though significant damages were sought.

*c. If you disagree with the proposed requirements, what quantitative disclosures do you believe would best fulfill users’ needs for quantitative information and at the same time not reveal significant information that may be prejudicial to an entity’s position in a dispute?*

We believe that the current disclosure requirements provide adequate information in today’s litigious environment. However, aggregated litigation accruals, similar to aggregated income tax accruals, would avoid disclosing prejudicial information. Litigation liabilities are already required to be disclosed under SEC Regulation S-X, Rule 5-02 if they exceed five percent of current liabilities or total liabilities, depending on balance sheet classification. Additional aggregate litigation disclosure is not adding material useful information to users.

*5. If a loss contingency does not have a specific claim amount, will an entity be able to provide a reliable estimate of the maximum exposure to loss (as required by paragraph 7(a)) that is meaningful to users? Why or why not?*

No. We do not believe a maximum exposure is relevant and reliable information for financial statement users or that it is representationally faithful. In our experience, plaintiffs claim outrageous amounts in the hopes of forcing a negotiation. These inflated amounts are not useful information in making an investment decision, and could result in

a shareholder not proceeding with an investment choice based on an exaggerated potential pay out amount. We do not provide disclosure of maximum warranty exposure, maximum bonuses that could be paid out, or maximum losses in the event of an earthquake or plague. Such an approach provides an overly negative potential outcome, and is potentially misleading.

*6. Financial statement users suggested that the Board require disclosure of settlement offers made between counterparties in a dispute. The Board decided not to require that disclosure because often those offers expire quickly and may not reflect the status of negotiations only a short time later. Should disclosure of the amount of settlement offers made by either party be required? Why or why not?*

No. Most settlement offers are made under confidentiality terms between the parties. If the terms had to be disclosed, that would seriously jeopardize the parties' negotiations, and possibly curtail resolutions that otherwise could have been achieved. Settlement offers can represent relevant information in assessing probability and range of exposure and, under the current rules, settlement offers will often be accrued as probable and estimable obligations. However, many other times settlement offers do expire quickly and represent only nuisance settlement value by the defendant or an attempt to "jump-start" bargaining efforts, so they do not actually represent a meaningful estimate of exposure. There have been times when we have made a nominal offer to a plaintiff where our assessment was that a nominal settlement would be more advantageous to shareholders than the cost of defense. When such an offer is rejected, most often we proceed to trial and the offer has little to no meaning going forward as it is taken off the table once we begin incurring the legal costs we had hoped to avoid. In addition, we would not want the settlement amounts of these nuisance cases disclosed as that would likely invite "copy-cat" or frivolous lawsuits. We do not believe these disclosures would aid users, and that they could harm shareholders by encouraging more litigation against the company.

*7. Will the tabular reconciliation of recognized loss contingencies, provided on an aggregated basis, provide useful information about loss contingencies for assessing future cash flows and understanding changes in the amounts recognized in the financial statements? Why or why not?*

No. Since recognized loss contingencies are accrued as current or long-term based on management's best assessment of timing of payments, we do not see how this disclosure benefits users. Significant changes in the amounts recognized are discussed in management's discussion and analysis. We do not see why a footnote is required to expand on such obligations. There are many judgmental estimates in the financial statements. Because under the prejudicial exemption companies will be forced to aggregate such disclosures, we do not believe that the benefits will be achieved by this proposal. Because the cases will not be identified, and a user cannot make a probability assessment, these aggregate numbers will be large, nearly meaningless amounts of dollars with no context.

Furthermore, it should be clear that this tabular reconciliation would only be required for material accruals. We acknowledge that the language at the end of the standard indicates that the standard need only be applied to material items, however, in many cases accruals may not be material, but overall litigation that is more than remote will be material. Our interpretation would be that paragraph 8 (and related paragraph 9) would not apply in such a circumstance, although all the other disclosure items would. If that was not the Board's intent, they should consider clarifying.

*8. This proposed Statement includes a limited exemption from disclosing prejudicial information. Do you agree that such an exemption should be provided? Why or why not?*

Yes, it should. Moreover, the presumption should be that the disclosure is prejudicial unless the company determines otherwise.

*9. If you agree with providing a prejudicial exemption, do you agree with the two-step approach in paragraph 11? Why or why not? If not, what approach would you recommend and why?*

No. We do not agree that these disclosures are helpful or in the best interest of shareholders. We believe that in most instances such disclosures would be prejudicial to the interests of the company and its shareholders. The new requirement as proposed would require that, "[i]n no circumstance may an entity forgo disclosing the amount of the claim or assessment against the entity (or, if there is no claim amount, an estimate of the entity's maximum exposure to loss); providing a description of the loss contingency, including how it arose, its legal or contractual basis, its current status, and the anticipated timing of its resolution; and providing a description of the factors that are likely to affect the ultimate outcome of the contingency along with the potential impact on the outcome." Again, we believe that disclosing the maximum exposure or claim is inflammatory and would not provide financial statement users with information useful in making investment decisions. In our experience, it is highly unlikely that the litigation would be settled or resolved for anything approaching the amount demanded. At one point nearly 10 years ago, Dell was facing potential asserted and unasserted liability from states in connection with alleged sales taxes due of over \$2 billion dollars. Over the course of this long time period, Dell was able to successfully negotiate or resolve these claims resulting in an ultimate payment of less than 5% of this amount. Dell has had analogous experiences with patent lawsuits where initial amounts asserted or demanded by plaintiffs were in the \$100's of million dollars or substantially higher, but the allegations were proven to be unfounded or settled and resolved for small percentages of the initial amount. Financial information skewed toward worse case scenarios will inappropriately paint a negative and unrepresentative picture of the financial position and risks of a company. We believe the current required disclosure is more appropriate and useful to users of financial statements.

*10. The International Accounting Standards Board (IASB) continues to deliberate changes to IAS 37, Provisions, Contingent Liabilities and Contingent Assets, but has not yet reconsidered the disclosure requirements. The existing disclosure requirements of IAS*

*37 include a prejudicial exemption with language indicating that the circumstances under which that exemption may be exercised are expected to be extremely rare. This proposed Statement includes language indicating that the circumstances under which the prejudicial exemption may be exercised are expected to be rare (instead of extremely rare). Do you agree with the Board's decision and, if so, why? If not, what do you recommend as an alternative and why?*

No. We do not believe that the circumstances under which the prejudicial exemption should be exercised should be either "extremely rare" or "rare." Instead, we believe that the exception should be the default rule under this proposal. We believe that in most instances we would need to preserve attorney-client and attorney work product privileges and contractual confidentiality obligations and avoid the potential harm as a result of a plaintiff obtaining confidential information. Finally, we do not support issuing a new standard that is not fully converged when there have been clear indications that we will be required to move to IFRS.

*11. Do you agree with the description of prejudicial information as information whose "disclosure . . . could affect, to the entity's detriment, the outcome of the contingency itself"? If not, how would you describe or define prejudicial information and why?*

We feel this is an accurate definition; however, it appears inconsistent with such an example being rare. Instead, we believe that this definition applies to the specific information required to be disclosed under the proposed requirements. We also believe that the definition should cover information that is protected by contractual confidentiality obligations or subject to attorney-client or attorney work product privilege.

*12. Do you believe it is operational for entities to disclose all of the proposed requirements for interim and annual reporting periods? Should the tabular reconciliation be required only annually? Why or why not?*

If this ends up being required, we believe an annual requirement with an update quarterly only for material changes is appropriate. Anything further would be contrary to the majority of other standards including the recently issued FIN 48. Warranty and other guarantee disclosures are already required quarterly under FIN 45 and do not require any changes. Cases take multiple years for closure. It appears unduly burdensome to require any update to the disclosure unless there is a material change.

*13. Do you believe other information about loss contingencies should be disclosed that would not be required by this proposed Statement? If so, what other information would you require?*

No.

*14. Do you believe it is operational for entities to implement the proposed Statement in fiscal years ending after December 15, 2008? Why or why not?*

No, compiling this level of information at multi-national companies, in coordination with outside counsel will not be a simple exercise. In addition, with an early August comment deadline, we do not see how the final standard can be out before late Fall. It is not reasonable for us to begin work assuming this is the final standard given many competing priorities for technical resources.

*Other matters:*

Disclosure of potential insurance recoveries

This standard would require, “[a] qualitative and quantitative description of the terms of relevant insurance or indemnification arrangements that could lead to a recovery of some or all of the possible loss, including any caps, limitations, or deductibles that could affect the amount of recovery.”

We believe it is only appropriate to disclose these in the case when the company has accrued the indemnification or insurance recovery. These are gain contingencies and can be contested by the insurance company or third-party. Why would the standard require disclosure of an insurance gain contingency but not all litigation where the registrant could win or is the plaintiff? Insurance or other indemnification agreements (e.g., from suppliers) can also be extremely complex and judgmental. To disclose such amounts would be misleading with respect to the potential upside or benefit to come to the company prior to these amounts being realizable by the company.

Subsequent events

This standard would also require additional disclosures in the event of subsequent events. Paragraph 10 indicates that if, “[a]fter the date of an entity’s financial statements but before those financial statements are issued, information may become available indicating that a liability was incurred after the date of the financial statements or that it is more than remote that a liability was incurred after that date. In those situations, an entity shall provide the disclosures required in paragraph 7. In the case of a loss arising after the date of the financial statements in which the amount of the liability incurred can be reasonably estimated, an entity may supplement the historical financial statements by disclosing pro forma financial data giving effect to the loss as if it had occurred at the date of the financial statements. It may be desirable to present pro forma statements, usually a statement of financial position only, in columnar form on the face of the historical financial statements.”

We assume this is only referring to Type II subsequent events, as material Type I events would need to be accrued. If that is the case, we do not believe pro forma disclosures are consistent with all of the other material events that could occur after a balance sheet date. This would include business combinations or a material restructuring event. We believe such an approach could cause additional confusion and pro forma financial statements should be consistently applied. Disclosure of the relevant impact is deemed sufficient.