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LETTER OF COMMENT NO. 9

January 15, 2009

Mr. Russell G. Golden
Director of Technical Application & Implementation Activities
Financial Accounting Standards Board
401 Merritt 7
P.O. Box 5116
Norwalk, CT 06856-5116

File Reference: Proposed FSP FAS 141(R)-a

Dear Mr. Golden:

Deloitte & Touche LLP is pleased to comment on proposed FASB Staff Position No. FAS 141(R)-a, "Accounting for Assets Acquired and Liabilities Assumed in a Business Combination That Arise From Contingencies" (the "proposed FSP").

We support the Board's efforts to clarify the principles in Statement 141(R)¹ related to the initial recognition and measurement, subsequent measurement and accounting, and disclosure of assets and liabilities arising from contingencies in a business combination. In addition, we agree with the Board's assertion in the Summary of the proposed FSP that fair value is the most relevant measurement attribute for assets acquired and liabilities assumed in a business combination. In our October 26, 2005, comment letter on the Statement 141(R) exposure draft, we acknowledged that contingent assets and liabilities should be recognized at fair value as of the acquisition date. However, that letter was written before we reviewed certain concerns expressed by constituents about legal contingencies (as outlined in paragraph 4 of the proposed FSP and noted in our August 7, 2008, comment letter on the proposed Statement, *Disclosure of Certain Loss Contingencies*).

As indicated in our response to Question 1 in Appendix A below, we believe that the proposed FSP would address some, but not all, of the concerns expressed by constituents. For example, the proposed FSP would require that certain legal contingencies still be recorded at fair value as of the acquisition date. Therefore, some of the concerns cited in paragraph 4 of the proposed FSP would still remain. We generally support the proposed FSP's overall method of accounting for contingent assets and liabilities arising in a business combination. However, we believe that to fully address the concerns cited in paragraph 4, the final FSP should explicitly indicate that all litigation-related contingencies and environmental remediation obligations should be accounted for in accordance with Statement 5.² In addition, as indicated below in our response to Question 4, we believe that certain modifications should be made to the criteria used to assess whether the fair value of a contingency can be reasonably determinable.

¹ FASB Statement No. 141(R), *Business Combinations*.

² FASB Statement No. 5, *Accounting for Contingencies*.

Appendix A contains our responses to the questions posed in the proposed FSP's Notice for Recipients. Comments on the proposed FSP, should the FASB proceed with the guidance as currently proposed, are included in Appendix B.

Deloitte & Touche appreciates the opportunity to comment on the proposed FSP. If you have any questions concerning our comments, please contact Stuart Moss at (203) 761-3042.

Yours truly,

Deloitte & Touche LLP

cc: Bob Uhl

APPENDIX A
Deloitte & Touche LLP
Responses to Notice for Recipients

Question 1: Will the proposed FSP meet the project's objective to improve financial reporting by addressing application issues identified by preparers, auditors, and members of the legal profession about Statement 141(R) related to the initial recognition and measurement, subsequent measurement and accounting, and disclosure of assets and liabilities arising from contingencies in a business combination? Do you believe the amendments to Statement 141(R) in the proposed FSP are necessary, or do you believe the current requirements in Statement 141(R) should be retained?

We believe that the proposed FSP addresses some, but not all, of the application issues related to Statement 141(R) that were identified by constituents. For example, paragraph 10 of the proposed FSP states:

An acquirer would have sufficient information to apply an income approach, and therefore the fair value of an asset or a liability arising from a contingency would be reasonably determinable, if information is available to reasonably estimate (a) the date the contingency will be resolved or a range of potential resolution dates, (b) the amount of future cash flows or a range of potential future cash flows, and (c) the probabilities associated with the potential resolution dates and potential future cash flows.

In addition, paragraph 13 of the proposed FSP states, in part:

[I]t is expected that sufficient information will be available to measure the acquisition-date fair value of other assets and liabilities arising from contingencies in a business combination, including some legal contingencies in the later stages of the case.

On the basis of discussions with entities and our past experience, we are concerned that preparers may be unable to reliably estimate their exposure to loss for many legal contingencies. Legal contingencies can be affected by a number of factors that are difficult to predict and estimate. Entities often do not establish methods for estimating exposure to loss, and any such estimate is likely to be subjective. We believe that preparers may be similarly unable to reliably estimate environmental remediation obligations. The proposed FSP indicates that in the later stages of a legal contingency, sufficient information is typically available for a preparer to reasonably determine the fair value of such contingencies. However, we do not agree with this assertion, because oftentimes such information is not available until just before settlement of such contingencies.

Further, we are concerned about an auditor's ability to obtain a reasonable level of assurance for auditing both (1) legal contingencies that are recorded at fair value and (2) legal contingencies that are not recorded because their fair value cannot be reasonably determined. The information that management might use to develop estimates and support amounts recorded (or not recorded) in the financial statements could come from sources to which the auditor does not have access. For example, management may have conversations with attorneys that are covered by attorney-client privilege and in which the auditor would not be able to participate.

We agree with the Board that the current requirements of Statement 141(R) related to contingent assets and liabilities arising in a business combination should be amended. However, we believe

that the final FSP should explicitly indicate that all litigation-related contingencies and environmental remediation obligations should be accounted for in accordance with Statement 5.³

Question 2: In developing this proposed FSP, the Board decided to adopt a model that is similar to the requirements in FASB Statement No. 141, Business Combinations. However, the Board decided to provide additional guidance for assessing whether the fair value of an asset or liability arising from a contingency can be reasonably determined. Additionally, the Board decided to provide subsequent accounting guidance for assets or liabilities arising from contingencies initially recognized at fair value, which was not provided in Statement 141. Do you agree with the Board's decision to provide this additional guidance, or do you believe the proposed FSP should carry forward the requirements in Statement 141 without reconsideration, including not addressing subsequent measurement and accounting? Alternatively, do you believe the proposed FSP should require that the initial and subsequent measurement of assets and liabilities arising from contingencies in a business combination be on the same basis (that is, assets and liabilities arising from contingencies initially recognized at fair value should subsequently be remeasured at fair value)?

Except as noted in our responses to Question 1 and Question 4, we agree with the Board's decision to adopt a model that is similar to Statement 141's and includes clarifying guidance for assessing whether the fair value of an asset or liability arising from a contingency can be reasonably determined. In addition, we agree with the Board's decision to provide subsequent accounting guidance for contingent assets and liabilities arising from contingencies that are recognized at fair value as of the acquisition date. Statement 141 was silent in this regard and we believe that subsequent accounting should be provided regardless of whether the FASB reverts to the accounting under Statement 141 or affirms the provisions of the proposed FSP. Further, we agree with the guidance in the proposed FSP and do not believe that it should be changed to require remeasurement of contingent assets and liabilities to fair value each reporting period.

Question 3: What costs do you expect to incur or not incur if the Board were to issue this proposed FSP in its current form as a final FSP? How could the Board further reduce the costs of applying the requirements without significantly reducing the benefits?

We encourage the Board to seek input from financial statement preparers regarding this question.

Question 4: This proposed FSP includes guidance for assessing when the fair value of an asset or liability arising from a contingency in a business combination can be reasonably determined. Do you believe the guidance in paragraphs 10–13 provides clear guidance for assessing when fair value can be reasonably determined? If not, please explain what additional guidance is necessary.

We do not believe that the guidance in paragraphs 10–13 clarifies how an entity assesses when fair value can be reasonably determined. Paragraph 10 of the proposed FSP states, in part:

An acquirer would have sufficient information to apply an income approach, and therefore the fair value of an asset or a liability arising from a contingency would be reasonably determinable, if information is available to reasonably estimate (a) the date the contingency will be resolved or a range of potential resolution dates, (b) the amount of future cash flows or a range of potential future cash flows, and (c) the probabilities associated with the potential resolution dates and potential future cash flows.

³ FASB Statement No. 5, *Accounting for Contingencies*.

Legal contingencies, even in the early stages, may satisfy the “reasonably determinable” criteria in paragraphs 10-13. An entity is often able to determine a range of potential resolution dates, a range of potential future cash flows, and the associated probabilities of occurrence for each. The mere identification of such ranges and probabilities should not be a determinative factor in an entity’s assessment of whether an amount is reasonably determinable. For example, a very large range may indicate that the fair value of a contingency is not reasonably determinable, yet such a conclusion may not be allowed under the proposed FSP. Therefore, we believe that the final FSP should specify other factors, such as the reasonableness of the range, for use in an entity’s assessment of whether the fair value of a contingency is reasonably determinable.

In addition, if the final FSP does not exclude litigation and those related to environmental remediation from the “reasonably determinable” assessment, the Board should consider removing the last sentence in paragraph 13 because it could create an unintended presumption that the fair value of legal contingencies can be reasonably determined in the later stages of a case. As indicated in our response to Question 1, we do not believe that this assertion will always be true.

Question 5: Constituents have raised concerns about liabilities arising from contingencies being recorded indefinitely when there is no clear resolution of the contingency because the acquirer does not believe settlement will ever be required and the liability is not subject to cancellation or expiration. Will the proposed amendment to Statement 141(R) that allows for the derecognition of a liability arising from a contingency when new information is obtained that indicates it has become remote that the obligation will be enforced address these concerns? Do you believe this guidance is operational?

If the FASB proceeds with the guidance in the proposed FSP, we believe that this clarifying guidance is operational and necessary.

Question 6: Although not clear, the Board did not intend the subsequent measurement and accounting guidance in Statement 141(R) to require that a liability arising from a contingency be recorded at its acquisition-date fair value until the contingency is completely resolved in cases where the acquirer is released from risk over time or the acquirer fulfills its performance obligation over time. Do you believe the clarifying guidance included in this proposed FSP is operational for the subsequent measurement and accounting of a liability initially recognized at fair value?

If the FASB proceeds with the guidance in the proposed FSP, we believe that this clarifying guidance is operational and necessary.

Question 7: Constituents have raised concerns about disclosing potentially prejudicial information in financial statements. Do you believe the revised disclosure requirements in this proposed FSP sufficiently protect sensitive information while providing users with useful information about contingencies arising from a business combination?

While we believe that the revised disclosure requirements might alleviate some of the concerns raised by constituents, we are concerned that application issues may still exist. For example, if an entity deems that the fair value of a liability associated with a legal contingency can be reasonably determined and records such amount, this fact alone may sometimes be akin to providing information that is considered prejudicial. The FASB should consult with legal specialists to determine whether the FSP’s requirements to record the fair value of legal contingencies could harm an entity’s defense.

APPENDIX B
Deloitte & Touche LLP
Additional Comments

Comments on certain paragraphs in the proposed FSP, should the FASB proceed with the guidance as proposed, are noted below.

Paragraph 6

As drafted, the proposed FSP excludes from its scope an acquiree's contingent consideration arrangements from prior deals assumed by the acquirer in a business combination. Further, the proposed FSP indicates that such arrangements would be accounted for as contingent consideration in accordance with Statement 141(R). Statement 141(R), however, does not explicitly address contingent consideration arrangements of an acquiree that relate to prior deals. We are concerned that the proposed FSP includes guidance on such arrangements about which the Board has not deliberated. In addition, the proposed guidance may conflict with the accounting under IFRS 3.¹

Paragraph 13

We suggest that the last sentence of paragraph 13 be deleted because the outcome of a legal contingency is frequently unknown until just before settlement. This sentence would create an unnecessary presumption that sufficient information is expected to exist in the later stages of a legal contingency.

Paragraph 14

The first sentence in paragraph 14 refers to an amount for liabilities that would be calculated in accordance with Statement 5 and Interpretation 14² and then adds, "and a similar amount for assets." We believe this guidance may be misleading because Statement 5 and Interpretation 14 will generally result in no amount being recorded for assets. In addition, the decision tree on page 11 of the proposed FSP does not clearly follow the words in paragraph 14. The decision tree leads the reader to believe that if the fair value of a contingent asset cannot be reasonably determined, but it is probable that an asset exists as of the acquisition date and the future settlement amount can be reasonably estimated, the asset should be recognized at the future settlement amount. We recommend that paragraph 14 be clarified to state whether contingent assets, for which the fair value cannot be reasonably determined, should be recognized in accordance with Statement 5 (i.e., generally no amount recorded) or at the best estimate of the future settlement amount.

In addition, we are concerned that the use of "reasonably estimated" in this paragraph may be confused with the term "reasonably determined" in paragraph 7. If the future settlement amount can be reasonably estimated, we believe the recognition criteria in paragraphs 7 and 14 may differ only with regard to probability of occurrence. If this was not the Board's intention, the terms "reasonably estimated" and "reasonably determined" should be clarified.

Paragraph 20

¹ IFRS 3, *Business Combinations* (revised 2008).

² FASB Interpretation No. 14, *Reasonable Estimation of the Amount of a Loss*.

Paragraph 20 indicates that if the acquirer recognized a liability arising from a contingency in a business combination at fair value, the acquirer would continue to report that liability at the acquisition-date fair value in the absence of any new information about the possible outcome of the contingency. We are uncertain whether this means that an acquirer would be prohibited from accreting such obligation over time. The guidance in this area should be clarified to indicate whether accretion would be appropriate in certain situations.

Paragraph 27

Paragraph 27(b) states that “if there has been a change in the measurement of the liability during the reporting period **from the acquisition-date fair value to an amount that would be recognized if applying Statement 5 and Interpretation 14**, the amount of the change and the reason for the change” should be disclosed (emphasis added). We believe that this could be interpreted to exclude liabilities that were initially recorded at fair value as of the acquisition date yet are recorded at a different amount in a subsequent reporting period because of performance of an obligation or release from risk. We suggest that the final FSP clarify that the disclosures in paragraph 27 are required any time the measurement basis of a contingent asset or liability changes to the Statement 5 and Interpretation 14 approaches during the reporting period.