



August 8, 2008

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

Re: File Reference No. 1600-100, Proposed Statement of Financial Accounting Standards – Disclosure of Certain Loss Contingencies

Dear Mr. Golden:

On behalf of AeA (American Electronics Association), I am writing to comment on the Financial Accounting Oversight Board's Proposed Statement, *Disclosure of Certain Loss Contingencies*, which proposes amendments to FASB Statements No. 5 and 141(R). In its current form, FAS 5 takes the appropriate approach to balancing a company's interests with those of investors. AeA members are concerned with the proposed expanded disclosures regarding loss contingencies, in particular, as they apply to potential losses from pending litigation and claims. Not only would the expanded disclosures be unduly burdensome to preparers, but they could be used by plaintiffs to the company's detriment in a litigation matter.

AeA, founded in 1943, is a nationwide non-profit trade association that represents all segments of the technology industry and is dedicated solely to helping our members' top line and bottom line. We do this in partnership with our small, medium, and large member companies by lobbying governments at the state, federal, and international levels; providing access to capital and business opportunities; and offering select business services and networking programs.

Litigation is not a typical business item, and the proposed revisions to the disclosure of legal actions would be prejudicial, not to mention extremely difficult to predict with reasonable accuracy. Under the proposed amendments, we believe that it would be difficult to provide meaningful disclosures about these loss contingencies because companies would be required to estimate their exposure before they have all of the facts and information necessary to do so. Litigation is complex and unpredictable, and management's own assessment could change as new information emerges and strategies evolve. These estimates can also be affected by other factors beyond the company's control, such as venue, admissibility of evidence, testimony, and other matters. The proposed assessments are so subjective in nature that different attorneys could come up with considerably different estimates. Instead of providing investors with better

information, the proposal would inevitably result in investor confusion and cause additional challenges for a company.

In addition to the significant time and costs associated with preparing these new disclosures, the proposal would jeopardize the attorney-client privilege and work product doctrine, and could result in preparers disclosing prejudicial information. The type of information that would be required to be disclosed is generally carefully protected during adversarial proceedings. Companies would be required to describe the contingency and how it arose, the factors that are likely to impact the outcome, the anticipated timing of its resolution, the company's assessment of the most likely outcome, and other significant assumptions the company made in estimating the amounts and likely outcome.

Providing this information would frustrate the adversarial system by requiring a defendant to provide insights into its strategy for dealing with a claim and provide its own best estimate of its maximum exposure even when the plaintiff has been unable to estimate its maximum loss. It would also potentially be the source of new litigation should the estimates turn out to be inaccurate. The proposed amendments could significantly harm a company's litigation posture, not to mention its current shareholders.

Responses to Selected Questions in the Proposed Statement of Financial Accounting Standards, Disclosure of Certain Loss Contingencies, an amendment to FASB Statements No. 5 and 141(R)

Question One: 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?

AeA does not believe the proposal will meet the objectives of providing investors with enhanced disclosures about loss contingencies. Companies would incur significant costs in terms of the number of hours their legal and auditing teams would be required to spend in preparing the new disclosures, and in some instances those costs would be incurred for contingencies for which the loss is considered remote. In return, we believe investors would be provided with less meaningful, if not confusing, information.

The needs of auditors and the desire of the legal teams to maintain attorney-client privilege and work product protection will create additional tensions. Among other items, the proposal would require companies to describe the contingency, the anticipated timing of its resolution, factors likely to affect its outcome, a qualitative assessment of the most likely outcome, and significant assumptions made by the entity in estimating the amounts. Generally, communications between an attorney and client in defending litigation are protected from discovery; however, in providing an assessment of the case for the purpose of preparing the disclosures, the attorney would risk waiving these privileges. It is even possible that the disclosures themselves could become admissible evidence.

This creates auditing challenges as a company's in-house and outside counsel would need to communicate with auditors during preparation of the disclosures. The attorneys would want to provide as little information as possible and the auditors would likely request as much information as possible regarding the contingency in order to sign off on the disclosures. It is conceivable that as a result of the Board's proposal that a company's litigation team would become more cautious in the information they provide to the company out of concern that the information would have to be disclosed. It is also possible that a company's management would avoid fully engaging its counsel in matters in order to prevent sensitive information from being disclosed later on. The tension that would be created in preparing the new disclosures would undoubtedly drive up costs with little benefit to the investor.

In addition, the risk of disclosing prejudicial information is significant. Essentially, a company's legal analysis could be incorporated into the disclosures, something that would certainly help a plaintiff or potential plaintiff. A company's adversary would be able to use the proposed expanded disclosures to its advantage at trial or during settlement negotiations and to the detriment of a company's current shareholders. In addition, should be disclosures be inaccurate, new lawsuits would inevitably result.

Question Three: 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. Currently, a loss contingency is disclosed if the likelihood of a material loss is reasonably possible. We believe that is the appropriate threshold, allowing companies to focus on those contingencies that are likely to expose a company to a potential loss. Eliminating that threshold would result in a substantial increase in the number of contingencies disclosed and would assist plaintiffs wishing to force disclosures, even for a suit that may be meritless. In addition, companies would then have to disclose why additional contingencies related to such lawsuits are not likely to result in a loss.

Question Four: 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?

AeA does not believe the change would result in improvements to the reporting of quantitative information about loss contingencies. As discussed above, a company's estimate of its maximum loss or range of loss can be difficult to formulate and can change throughout the course of litigation as it can be impacted by facts uncovered during discovery, testimony, and other items outside of the company's control. This makes it unlikely that a company would be able to provide an accurate estimate. Even if a company were able to provide a reasonably accurate estimate of its maximum possible exposure to loss, this number would likely overstate a company's true exposure to loss, as the maximum possible exposure or range of loss rarely reflects the likely resolution of a contingency.

Providing this disclosure would also unfairly advantage plaintiffs as a defendant would be required to disclose its own estimate of its exposure to loss. Plaintiffs would not be required to provide their own estimates, and this disclosure would undoubtedly weaken a defendant's position to the detriment of its shareholders. Should the final resolution of the contingency substantially differ from the estimate, the disclosure itself could also spark future litigation.

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?

We do not believe this disclosure should be required for the reasons stated above in the previous response. Requiring disclosure in this situation, where the amounts disclosed are not representative of loss exposure, would not be useful to investors and could actually be misleading.

Question Five: 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?

As stated in our response to question 4a, it is often impossible to reliably estimate the maximum exposure to loss. Providing such an estimate would not be meaningful to investors, it could prejudice a defendant's position, and it could become the source of future litigation.

Question Six: 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?

We agree with the Board's decision to not require disclosure of settlement offers for the reasons set forth by the Board. Disclosing settlement offers or actual settlement amounts could be used by third parties and could have a chilling effect on other pending settlement negotiations. In addition, settlements are often subject to confidentiality agreements and the disclosures would

compromise these negotiations. Should a settlement not occur, such disclosure could also prejudice the defendant moving forward.

Question Seven: 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?

We do not believe that the tabular reconciliation of recognized loss contingencies, provided on an aggregate basis, would provide the intended benefits to investors. The proposal also would require a qualitative description of significant activity during the reporting period, which could prejudice the company's position in litigation and settlement negotiations, especially if a significant increase is attributable to one case.

Question Eight: 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, we believe an exemption from disclosing prejudicial information should be provided; however, due to the nature of litigation, it is likely that this exemption would apply in most circumstances and not only in "rare instances." Management has a fiduciary duty to protect its company's assets and protect the company's confidential information, and the proposed expanded disclosures are inconsistent with that duty. The proposed qualitative disclosures are also in conflict with the attorney-client privilege and work product doctrine. Disclosure of this kind of information, even if aggregated, would compromise a company's position to the benefit of its adversaries.

Question Nine: 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 believe aggregating the information will be effective as there probably will not be enough contingencies of a similar nature to achieve the intended protection against disclosing prejudicial information. The detailed descriptions of the contingencies are going to be case specific, and if a company is involved in only one action, aggregation would be impossible. Aggregating disclosures would not provide investors with meaningful information and instead would likely provide investors with less useful information than can currently be obtained under FAS 5.

Question Ten: 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. As noted in our previous responses, we believe utilization of the exemption would be frequent. Should the Board amend the FAS 5 disclosure requirements, we recommend the Board provide a broad prejudicial exemption that would effectively protect companies engaged in disputes.

Question Twelve: 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?

We do not believe it is operational for companies to disclose all of the proposed requirements for any of the reporting periods for the reasons stated in this letter. The proposed requirements will not provide investors with enhanced disclosures. The costs of complying will far outweigh any commensurate benefit to investors.

Question Thirteen: 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.

Question Fourteen: 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?

AeA does not believe there is sufficient time for implementation. The Board still needs to review comments relating to this proposal, issue a final Statement, and conduct field testing. Considering the efforts associated with gathering, analyzing, and preparing the disclosures, it is not realistic to expect companies, and particularly calendar year entities, to be able to comply with the new requirements with the currently proposed effective date.

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We appreciate the opportunity to comment on the Exposure Draft. If you have any questions, please feel free to contact me at (202) 682-4448.

Sincerely,

Marie K. Lee Counsel and Director, Finance and Tax Policy