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Russell Golden
Technical Director
Financial Accounting Standards Board
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director@fasb.org

Re: ***Proposed Accounting Standards Update – Disclosure of Certain Loss Contingencies (File Reference No. 1840-100)***

Dear Mr. Golden:

We are pleased to have the opportunity to comment on the Financial Accounting Standards Board's (the "FASB") proposed accounting standards update relating to disclosure of certain loss contingencies (the "New Exposure Draft").[1] O'Melveny & Myers LLP has substantial professional expertise and practical experience addressing the issues and questions raised by the New Exposure Draft and the comments that follow are based on our practice advising both public and private companies.

Providing investors with the information they require to assess the likelihood, timing, and magnitude of loss contingencies is important to our free-market system. However, the New Exposure Draft requires disclosures that will likely harm reporting entities and undermine the fair adversarial process of litigation. To the extent that reporting entities are harmed by the new disclosures, so too will their shareholders be harmed. We detail below some of our specific concerns regarding the New Exposure Draft.

Remote Loss Contingencies

We believe the New Exposure Draft's introduction of a disclosure requirement for asserted but remote loss contingencies that could have a "severe impact" on a reporting entity will generate confusion and result in the inclusion of misleading information in financial statements by significantly overstating the likelihood and materiality of such contingencies. The

[1] Exposure Draft, *Proposed Accounting Standards Update – Disclosure of Certain Loss Contingencies*, File Reference No. 1840-100 (July 20, 2010).

very fact that a loss contingency is remote generally means that it is not currently material to the reporting entity's condition. The New Exposure Draft appears to require disclosure of even those matters that are immaterial to the reporting entity due to their remoteness if they might have a "severe impact" -- a change from current disclosure standards, under which immaterial matters are not required to be disclosed. Requiring reporting entities to disclose remote loss contingencies resulting from unsubstantiated claims in legal actions will result in disclosure that may be misinterpreted when assessing a reporting entity's liquidity and financial obligations and may serve only to distract investors from truly relevant financial disclosures.

Further, the New Exposure Draft fails to provide sufficient guidance regarding the manner in which a reporting entity is to determine those loss contingencies that may have a "severe impact" on a reporting entity. Without such guidance, reporting entities likely will adopt widely varying interpretations, leading to inconsistent financial reporting. Reporting entities also will likely find it highly challenging and expensive to properly implement processes and controls to identify all remote contingencies and assess their relative severity. Finally, it is unlikely that legal counsel will be able to provide auditors with the information they require to appropriately audit such "remote" contingencies while simultaneously preserving attorney-client privilege and confidentiality.

Prejudicial Exemption

The New Exposure Draft removes the "prejudicial exemption" contained in the 2008 proposal[2] in favor of requiring disclosure of "non-privileged information that would be relevant to financial statement users to enable them to understand the potential magnitude of the loss." However, the New Exposure Draft appears to require reporting entities to disclose litigation strategies, assessments, and predictions regarding loss contingencies that are necessarily based on non-public information that may well be confidential. Moreover, the required disclosures do not always relate to amounts already accrued in the financial statements; for those loss contingencies deemed remote or reasonably possible, no accrual is required but the New Exposure Draft would cause reporting entities to provide confidential information such as the basis for the reporting entity's defense. Additionally, the interaction of the tabular disclosure and the qualitative disclosures for loss contingencies accrued in the financial statements would provide confidential information to plaintiffs to the prejudice of the reporting entity and its shareholders. The result is an accounting standard that may change the contingency it was merely intended to measure.

While the ability to aggregate may address some concerns related to the disclosure of prejudicial information, this protection is severely limited and the New Exposure Draft appears biased against aggregation, as discussed below in more detail. Aggregation may be helpful to avoid revealing prejudicial information if a reporting entity has numerous legal contingencies. However, if a reporting entity has few legal contingencies either in total or within a particular

[2] Exposure Draft, *Proposed Statement of Financial Accounting Standards – Disclosure of Certain Loss Contingencies*, File Reference No. 1600-100 (June 5, 2008).

type or class of claims, plaintiffs will be able to gain valuable insight into a reporting entity's estimate of its possible loss, to the detriment of the reporting entity and its shareholders.

Reporting entities were previously permitted to omit potentially prejudicial information regarding loss accruals. The loss of that exemption will compound the severity of any accrued loss by advantaging the plaintiff and introducing upward volatility and uncertainty into the litigation process. On the other hand, reverting to the requirement to disclose amounts accrued only if necessary to make the financial statements not materially misleading would allow for a case-by-case evaluation of disclosures to determine if information is prejudicial and permit investors to focus on the truly important disclosures in the financial statements.

Disaggregation Bias

While the New Exposure Draft permits aggregation by class or types of loss contingencies for disclosure purposes, it requires reporting entities to consider, among other things, the nature of the claims, terms and characteristics, jurisdictions that have different legal characteristics, and timing of expected future cash outflows. The number and nature of the required considerations limits the availability of aggregation to a narrow set of circumstances. Aggregation serves the dual purposes of preventing voluminous disclosures in numerous categories and possibly providing some protection for reporting entities against the disclosure of prejudicial litigation information that is not individually material. We believe that the FASB should review the New Exposure Draft's aggregation limitations and revise them to allow reporting entities to use greater discretion regarding the aggregation of disclosures, particularly if the FASB does not include a prejudicial information exemption in the final FASB standard.

Tabular Disclosure

The New Exposure Draft requires a tabular reconciliation for each class of recognized loss contingencies for each period for which an income statement is presented. This reconciliation would disclose increases for new loss contingencies and any change in estimates for contingencies recognized in prior periods. As the estimates represent management's determination that a loss in that amount is "probable," they may provide considerable insight into management's view of the contingency being assessed. As such, tabular reconciliation poses a significant risk of disclosing prejudicial information where litigation contingency matters do not fall within the same class or type of aggregation criteria and, therefore, result in the disclosure of individual contingencies. Even when aggregated with other claims, it often may be evident that a particular claim accounts for the bulk of an aggregated provision -- particularly when updated for changes in estimates. The estimated loss information is likely to impact or even operate as a floor for settlement discussions. Additionally, we believe reporting entities would struggle to implement processes and controls to provide the required disclosure support on a quarterly basis with existing reporting deadlines. As such, if tabular disclosure is required in the final FASB standard, we believe that the FASB should require it only on an annual basis.

Insurance Information Disclosure

The New Exposure Draft provides for disclosure of information that "is discoverable by either the plaintiff or a regulatory agency." Blanket disclosure of "discoverable" insurance coverage information has the potential to be prejudicial and to significantly harm reporting entities and insurers. Insurance coverage information is of limited relevance, highly prejudicial and subject to other limitations on admissibility in ongoing litigation. Additionally, its public disclosure may encourage new lawsuits by plaintiffs who would know that insurance is available to pay their claim and would be able to tailor their claims to take advantage of known amounts and types of insurance coverage. Finally, the "discoverable" standard is over-broad and could vary widely depending on jurisdiction, timing, court, and the issuance of protective orders permitting discovery but with confidentiality. The "discoverable by a regulatory agency" standard would require the disclosure of virtually all information in highly-regulated industries, rendering the condition essentially meaningless. In order to avoid disclosing unduly prejudicial information, we believe that only publicly-available information regarding insurance coverage should be required to be disclosed.

Claimed Damages Disclosure

The New Exposure Draft requires reporting entities to disclose damages as claimed by a plaintiff, without any type of reasonableness or probability filter. However, extreme damage amounts are frequently part of litigation tactics and this disclosure would provide no meaningful information to investors. While additional qualitative disclosures might help provide context, relying on plaintiff damage claims would serve only to present investors with the worst-case scenario. Additionally, such contextual disclosures are extremely similar to the predictive type of disclosures included in the 2008 proposal and we believe that reporting entities would find it difficult to provide enough information to auditors to allow for such remote contingencies to be audited.

Materiality Assessments and Possible Recoveries

The New Exposure Draft would require reporting entities to assess the materiality of loss contingencies without regard to insurance or other indemnification arrangements. However, litigation is a routine matter in many industries and reporting entities in those industries will likely have provided for such a possibility through extensive third-party or self insurance arrangements, the cost of which is disclosed in the financial statements. Indemnification, contribution, and similar arrangements are key elements of commercial transactions which are routinely relied upon in evaluating transactions and risk of loss. A reporting entity should not be obligated to disclose a potential loss if it has sufficient insurance to cover all or enough of the claim to render the loss immaterial. Additionally, prohibiting consideration of possible recoveries in determining the need for disclosure will expand significantly the number of disclosures required and inundate investors with unnecessary and unhelpful information.

Effective Date

The New Exposure Draft states that the revised standard will be effective for fiscal years ending after December 15, 2010. However, reporting entities will require significant time to

confer with counsel, auditors, management, and the board of directors regarding privilege and prejudice issues, internal systems and processes to aggregate the information necessary for the new disclosures, and compliance with the Sarbanes-Oxley Act of 2002. Therefore we believe that this effective date does not allow sufficient time to implement the new requirements and request that the FASB make them effective for fiscal years ending after December 15, 2012 or December 15, 2011 at the earliest.

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We would be pleased to discuss our comments or our views on the New Exposure Draft more generally at your convenience. Please contact Martin P. Dunn at (202) 383-5300.

Sincerely,

O'MELVENY & MYERS LLP