August 23, 2010

Mr. Russell Golden
Technical Director
Financial Accounting Standards Board
401 Merritt 7
PO Box 5116
Norwalk, CT 06856-5116

Via e-mail: director@fasb.org

Re: File Reference No. 1840-100: Proposed Accounting Standards Update of Topic 450, Disclosure of Certain Loss Contingencies

Dear Mr. Golden:

Freeport-McMoRan Copper & Gold Inc. appreciates the opportunity to comment on the Financial Accounting Standards Board’s (FASB’s) proposed Accounting Standards Update, Disclosure of Certain Loss Contingencies, issued July 20, 2010 (the proposed ASU).

The following discussion describes some of the main concerns we have about the proposed ASU.

Providing Disclosure of Amounts Accrued and a Tabular Reconciliation will Result in Disclosures of Inmaterial but Prejudicial Information, Increasing Companies’ Litigation Exposure Without Benefit to Stockholders

Disclosure of the amount accrued for an individual litigation contingency would in most cases be highly prejudicial to a company and its stockholders. Under current standards, companies accrue loss contingencies that are both probable and reasonably estimable, and disclosure of such amounts is not required except in circumstances where it is necessary for the financial statements not to be misleading. However, under the proposed ASU disclosure of amounts accrued for loss contingencies would be required. As a result, a company’s litigation adversaries would be able to discern from its published financial statements how much of their potential recovery the company believes is probable and estimable, and it may become impossible, as a practical matter, to settle the dispute for an amount less than the amount accrued. Furthermore, the amount accrued for one matter may set a new floor for expectations of similarly situated adversaries, thereby driving up the cost of those settlements and even encouraging “copycat” litigation.

Additionally, once an accrual is disclosed in a public filing, the accrual is likely to be admissible evidence in the related litigation. The admissibility at trial of such accruals will create a perverse scenario of exposing stockholders to increased litigation losses through the very disclosures purporting to help stockholders understand corporate risks. Indeed, the admissibility of an accrual may be used against the company by suggesting that a decision to accrue against a contingent risk is an admission of liability. Moreover, even if the accrual is not itself admissible at trial, the accrual
could still be used in the course of discovery under rules allowing discovery of relevant information that is not admissible at the trial, if the use of such information appears reasonably calculated to lead to the discovery of admissible evidence. Accordingly, corporate testimony could be sought about the nature of the now-disclosed accrual, even if the accrual itself were not admitted as evidence at trial.

The proposed tabular disclosure reconciling loss contingency accruals suffers from the same shortcomings discussed above, but is even worse. Not only do adversaries get the benefit of an initial case assessment, but under these provisions they get a quarterly update of a company’s (and its counsel’s) judgments about the potential financial impact of the contingency at all steps in the proceedings as it makes its way through the court system. Additionally, regardless of how a particular accrual is ultimately adjusted over time, litigation adversaries will likely point to the maximum accrual as the most realistic value of the litigation. Providing this reconciliation would be far more harmful to a company and its stockholders than helpful to users of financial statements. These financial statement disclosures would impede a company’s ability to make its best case, resulting in significant prejudice to its defense as well as an increase in the costs of resolving disputes.

We are also highly concerned about the requirement to disclose cash payments or settlements during the period. A company may have only one settlement during a period, in which case the amount of the settlement will be made public. It is common for cases to be settled on a confidential basis and for a company to consider confidentiality to be a key element of the settlement. For example, consider a case that is brought on behalf of a group of individuals instead of as a class action. Even if a company believes its risk of a loss is remote, it may be willing to settle for considerably more than its costs of defense in order to eliminate “wild card” risks increasingly associated with civil litigation. If the amount of settlement were made public in these types of cases, companies would be subjected to an increased risk of “copycat” lawsuits.

The proposed ASU contemplates that concerns of prejudicial disclosure can be solved by permitting aggregation by classes of similar loss contingencies, thereby masking the amount accrued for any particular contingency. However, this solution will not work in a situation where a particular contingency is of such a nature that it cannot be aggregated with others, or where a company may have only one or a few significant contingencies. For example, a company may aggregate environmental remediation obligations; however, if it had only one significant stockholder derivative action or one significant mass toxic tort claim, it would likely not be appropriate to aggregate those claims with the environmental remediation obligations, with each other, or with other types of claims. As a result, changes associated with specific loss contingencies would be disclosed in the financial statements, and as previously noted would reveal to litigation adversaries what a company has assessed as probable and estimable with respect to their claims, as well as give them insight into litigation strategies and changes in the company’s assessment of their claim over time.

In addition, the guidance on aggregation criteria itself demonstrates how difficult - if not impossible - it will be to apply, particularly in the time frame proposed. The proposed ASU states that “... it may not be appropriate to aggregate amounts related to individual litigations with those
related to class-action lawsuits or to aggregate litigations in jurisdictions that have different legal characteristics that could affect the potential timing or the potential magnitude of the loss. Furthermore it may not be appropriate to group together in one class loss contingencies that have significantly different timings of expected future cash outflows (that is, near term versus longer term).” In other words, no matter the similarities, aggregation seems disfavored if there are differences, as there always are. Also, determining appropriate classifications for the wide range of loss contingencies for many public companies would require a substantial amount of time and effort on the part of companies, as well as on the part of their external auditors.

In summary, we believe the current standards for disclosure of accruals for loss contingencies are appropriate, as they are required when necessary for the financial statements not to be misleading, but do not require disclosure of immaterial information that may be prejudicial to a company and its stockholders. However, if the requirement to include a tabular reconciliation is adopted, we recommend that it should only be required on an annual basis, because for many public companies it will be very time consuming and burdensome not only to collect the relevant information, but also to ensure that it is presented in the appropriate categories, within the deadline to file quarterly reports with the U.S. Securities and Exchange Commission (the SEC).

Providing Quantitative Disclosure of Possible Insurance and Other Recoveries will also Result in Increased Litigation Exposure without Benefit to Stockholders

The proposed ASU would require companies to disclose, for all contingencies that meet the disclosure thresholds, quantitative information about possible recoveries from insurance and other sources only if, and to the extent that, it has been provided to the plaintiff(s), it is discoverable by either the plaintiff or a regulatory agency, or relates to a recognized receivable. In some circumstances, if specifically asked by a litigation adversary, a company is required to disclose that there is insurance coverage and to provide a copy of the policy. However, companies are generally not required to disclose to litigation adversaries their or their insurers’ views of the potential recovery under the policy. Accordingly, the proposed ASU would require companies to make a determination of whether a policy is discoverable, and if so, to disclose its existence, regardless of whether the litigation adversary has asked for this information. Additionally, because disclosure simply of the existence and basic terms of the policy could be incomplete or misleading in many circumstances, the proposed ASU appears inevitably to require a company to divulge its analysis of the amount of coverage available under the policy for the particular contingency, which is not otherwise required and could be highly prejudicial, not only in its case against its litigation adversary but also in a dispute with the insurer. This disclosure would require judgments that are predictive or speculative and would risk waiver of the attorney-client privilege and attorney work-product doctrine.

We also believe that, in many cases, disclosing the insurance coverage that may or may not be available could be harmful to a company and its stockholders because it may establish an expectation of recovery on the part of the company’s litigation adversaries. In particular, litigation adversaries may use the full limits of liability of the disclosed policy as the floor on which they would base their settlement demands, regardless of whether the company can reasonably expect to receive the full policy limits from its insurer. This type of disclosure could also invite other
potential adversaries to file suit seeking recoveries based on the existence of a perceived pool of funds represented by these policies.

The proposed ASU also requires disclosure when the insurance company has denied, contested, or reserved its rights related to claims for recovery. We believe this requirement is also prejudicial in that insurance companies generally always reserve their rights with respect to claims arising out of large, complex lawsuits, and disclosure of this fact could be confusing to a financial statement user and therefore would necessitate disclosure of additional clarifying information, which could include non-public and privileged information related to the matter being disclosed.

**Disclosure of the Amount Claimed by the Plaintiff or the Amount of Damages Indicated by the Testimony of Expert Witnesses Would Often be Misleading and Require Further Explanation, Revealing Non-public and Privileged Information**

The proposed ASU would require companies to disclose, for all contingencies that meet the disclosure thresholds, publicly available quantitative information, including amounts claimed by the plaintiff or the amount of damages indicated by the testimony of expert witnesses.

We do not believe there should be a requirement to disclose damage claims and expert witness testimony, even when this information is publicly available. Many times damage claims and expert estimates of damages are highly inflated and bear no relation to a reasonably expected outcome in the matter. In many cases, disclosing such information in financial statements would give it an appearance of credibility that it does not deserve, and would be confusing and even misleading to users of the financial statements. As a result, companies would feel compelled to disclose their analysis of why these amounts are highly unlikely or impossible to be realized, leading to disclosure of potentially non-public and privileged information and analysis. We believe the better approach is to allow companies to make disclosures based on their judgment of what information is material based on the particular facts and circumstances of each matter, which we believe is the current practice of many companies.

**The Level of Detail and Analysis Indicated by the Illustrative Narrative Disclosure is Too Broad and Should be Limited to Information in Publicly Available Documents**

The proposed ASU dictates more extensive narrative discussion of a loss contingency as it progresses. We believe that the negative implications of this requirement are exhibited by the proposed ASU’s illustration. The example chosen for the illustration is simplistic, but indicates a very detailed level of analysis and disclosure. Many litigation contingencies are much more complex than the illustration, and we are concerned that applying the indicated level of analysis and disclosure to more complex litigation could not only reveal litigation strategies but also expose companies to claims that they have waived attorney-client privilege or the attorney work-product doctrine. We recommend that the proposed ASU, if adopted, make clear that the narrative information is only required to describe information in publicly available documents that is necessary to give the financial statement user a general understanding of the nature of the significant claims and defenses raised and the procedural status of the case.
The Proposed Standard for Disclosure of Asserted Remote Loss Contingencies that Could Have a Severe Impact Will Lead to Disclosure of Information that is Immaterial and Prejudicial

The proposed ASU adds a new disclosure threshold for asserted remote loss contingencies to inform users about the entity’s vulnerability to a potential “severe impact.” Public companies are very experienced in assessing the materiality of a contingency for disclosure for federal securities law purposes, by balancing the probability that the event will occur with the magnitude of the consequences if it does occur, with the goal of determining whether there is a substantial likelihood that a reasonable investor would consider the information important (or material) in making an investment decision. For example, a preparer may determine that disclosure is advisable for certain contingencies deemed remote. On the other hand, there are also some contingencies that are deemed “so remote” or even frivolous, that they should not be disclosed, even if they would have a significant impact if realized.

We believe that the proposed ASU, as written, will lead companies to include disclosure of all asserted remote contingencies that could have a potentially severe impact, without taking into account “how remote” that outcome may be. This could lead to disclosure of frivolous or extremely remote contingencies, giving them the appearance of more credibility than they deserve, confusing and even misleading financial statement users, and facilitating the aims of frivolous claimants to the detriment of stockholder value. Inclusion of this information will inevitably lead companies to conclude they must provide further explanation, risking disclosure of non-public and privileged information. The problem is compounded by the new prohibition on companies considering possible insurance or other recoveries, which is addressed below, because under the proposed ASU a company could be required to discuss events that are highly unlikely to happen and, even if they did happen, would be fully insured.

The Prohibition on Considering Potential Insurance or Other Recoveries Will Lead to Discussions of Immaterial Matters, and Should be Eliminated

The proposed ASU adds a new provision that when assessing the materiality of loss contingencies to determine whether disclosure is required, the possibility of recoveries from insurance or other indemnification arrangements shall not be considered. In explaining this new provision, the proposed ASU states that insurance coverage often is uncertain and may be subject to litigation with the insurer; therefore, an entity may be exposed to loss even when it believes that the loss contingency is fully covered by insurance.

While it is true that insurance coverage often is uncertain, it is also true that insurance coverage sometimes is certain or probable (e.g., when there is no dispute between the company and its insurer as to coverage). As part of their ongoing risk management process, companies usually purchase insurance to cover ordinary expected losses in their businesses, such as auto insurance and workers’ compensation insurance or other insurance that may be standard for a particular ordinary industry-related risk. Claims made under these policies may be substantial, yet may also be fully insured. We do not believe that users of financial statements will find it useful to read through a discussion of ordinary business risks that are fully insured.
When considering which loss contingencies should be described in their financial statements, companies should be permitted to consider insurance or other recoveries, giving due regard to the probability and potential timing and amount of the recovery. We note that this approach is consistent with the approach of the SEC, which permits companies to consider potential insurance or other recoveries when considering whether the criteria for disclosure in Management’s Discussion and Analysis of Financial Condition and Results of Operations have been met with respect to a contingency.\(^1\)

**If Adopted, the Proposed ASU Should Include an Exemption for Prejudicial Effect**

The FASB’s June 2008 Exposure Draft, *Disclosures of Certain Loss Contingencies*, contained an exemption from disclosing prejudicial information, defined as information that the disclosure of which could affect, to the entity’s detriment, the outcome of the contingency itself. The exemption would have permitted companies to aggregate the required disclosures at a level higher than otherwise required as necessary to eliminate the prejudicial effect, and in “rare” circumstances, would permit the entity to forgo disclosing the prejudicial information if aggregation did not do so (such as if the entity were involved in only one legal dispute), provided that disclosures (1) were made regarding the fact that, and reason why, the information was not disclosed, and the amount of the claim (or if no claim amount was stated, an estimate of the entity’s maximum exposure to loss), and (2) included 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 a description of the factors likely to affect the ultimate outcome along with the potential impact on the outcome.

If the proposed ASU is adopted, we recommend that FASB include an exemption from disclosing prejudicial information, which would permit aggregation at a higher level or, if that were not sufficient to eliminate the prejudicial effect, exclusion of the information, unless disclosure is necessary for the financial statements not to be misleading. We believe prejudicial information should be defined as any information that in management’s judgment could be prejudicial to an entity’s position (*i.e.*, disclosure of the information could affect, to the entity’s detriment, the outcome of the contingency itself, or similar contingencies). We also do not believe that use of this alternative should be characterized as “rare,” because we do not believe that its use will be rare, and we do not believe that any additional disclosure about the omitted information itself should be required, as that in itself is also likely to be prejudicial.

**The Effective Date Should be Extended**

The proposed ASU represents a significant departure from current practice and, as indicated by our comments above, is problematic at many levels. Further, the proposed ASU continues to raise important issues regarding attorney-client privilege and attorney work-product, and the nature of information that would be sought by external auditors, which are the subject of the ABA-AICPA “Treaty” and will need to be carefully considered.\(^2\) We strongly urge the FASB to provide for a

---

longer period of comment and public discussion about the implications of the proposed new standards, and if new standards are adopted, for a transition schedule longer than the less than four months currently envisioned.

In conclusion, we are not aware of any persuasive evidence that the current standards for disclosures of loss contingencies, which we believe are well understood by financial statement users and have been in effect for many years, are not working reasonably well. Furthermore, we believe that public companies in particular already have strong incentives to strive to make accurate and timely disclosures regarding loss contingencies, and to avoid surprises to investors when possible, as they risk significant corporate and personal liability exposure if they fail. Accordingly, we do not believe that the changes proposed by the proposed ASU are appropriate, and we believe that they could in fact be harmful to companies and stockholders.

We appreciate your consideration of our views and would be happy to discuss these matters further should you have any questions.

Sincerely,

C. Donald Whitmire, Jr.
Vice President and Controller
Financial Reporting

L. Richards McMillan, II
Senior Vice President and General Counsel

cc: Richard C. Adkerson
Kathleen L. Quirk

---

2 See ABA Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information, adopted by the ABA Board of Governors, and the AICPA Statement on Auditing Standards No. 12, adopted as an interim auditing standard for public companies by the Public Company Accounting Oversight Board.