MINUTES

Financial Accounting Standards Board

To: Board Members

From: Disclosure of Certain Loss Contingencies Team

(Milne, ext. 393)

Subject: Minutes of the August 19, 2009, Board Meeting: Disclosure of Certain Loss Contingencies

Date: October 2, 2009

cc: FASB: Bielstein, Golden, Stoklosa, Proestakes, Elsbree, Bhave, Hildebrand, Lott, Posta, Glotzer, C. Smith, Mechanick, Hood, Brickman, Milne, Kubic, Davis, Gabriele, Chookaszian, Klimek, Galloway (GASB), Intranet; IASB: Leisenring, Brown, Baldurs

The Board meeting minutes are provided for the information and convenience of constituents who want to follow the Board's deliberations. All of the conclusions reported are tentative and may be changed at future Board meetings. Decisions become final only after a formal written ballot to issue a final Accounting Standards Update.

Topic:	Disclosure of Certain Loss Contingencies
Basis for Discussion:	Board Memorandum No. 14
Length of Discussion:	11:00 a.m. to 12:10 p.m. and 1:00 p.m. to 1:45 p.m.

Attendance:

Board members present:	FASB: Herz, Linsmeier, Smith, and Siegel
	IASB: Leisenring
Board members participating by phone:	Seidman
Staff in charge of topic:	Elsbree
Other staff at Board table:	Golden, Proestakes, Bhave, Milne, Kubic, Davis

Summary of Decisions Reached

The Board began redeliberations of disclosure requirements for certain loss contingencies. The Board decided to initially focus its deliberations on loss contingencies associated with litigation and to consider other types of loss contingencies at a future meeting.

The Board decided on the following disclosure objective:

> An entity shall disclose qualitative and quantitative information about the loss contingency to enable a financial statement user to understand the nature of the contingency and its potential timing and magnitude.

The Board decided on the following broad principles for disclosures about loss contingencies:

1. Disclosures about litigation contingencies should focus on the contentions of the parties, rather than predictions about the future outcome.

2. Disclosures about a contingency should be more robust as the likelihood and magnitude of loss increase and as the contingency progresses toward resolution.

3. Disclosures should provide a summary of information that is publicly available about a case and indicate where users can obtain more information.

The Board decided to maintain the existing requirement to disclose asserted claims and assessments whose likelihood of loss is at least reasonably possible and to clarify that *at least reasonably possible* and *more than remote* have the same meaning. The Board also

decided that certain remote loss contingencies should be disclosed, and it directed the staff to develop possible approaches for discussion at a future meeting. The Board also decided to maintain existing threshold requirements for unasserted claims and assessments and agreed to enhance the existing interpretive guidance about the threshold.

The Board decided that entities should not consider the possibility of recoveries from insurance or indemnification arrangements when assessing whether a contingency should be disclosed.

Regarding quantitative disclosure requirements, the Board directed the staff to develop an approach that would focus on disclosure of nonprivileged quantitative information that would be relevant to making an estimate of the potential loss, for consideration by the Board at a future meeting.

The Board decided not to require entities to disclose information about settlement negotiations.

The Board decided to require disclosure about possible recoveries from insurance and other sources if and to the extent that the information has been provided to the plaintiff in discovery.

The Board discussed the effective date of any final guidance on this project and decided not to rule out the possibility that it could be effective for fiscal years ending after December 15, 2009.

Objective of Meeting:

The objective of the meeting was to have the Board discuss the plan for redeliberations and to begin redeliberations on the project, Disclosure of Certain Loss Contingencies. The Exposure Draft, *Disclosure of Certain Loss Contingencies*, was issued on June 5, 2008, and had a comment letter deadline of August 8, 2008.

The objective of the meeting was met.

Matters Discussed and Decisions Reached:

1. Mr. Elsbree began the meeting by providing a background on the plan for redeliberations. Mr. Elsbree stated that the staff believes the Board should redeliberate all the significant issues related to the project, focus specifically on litigation-related contingencies, and later evaluate whether certain types of contingencies should be included or excluded from the scope of this project. Mr. Elsbree indicated that it may take two or three Board meetings to redeliberate all of the issues.

2. Mr. Elsbree noted the key issues to be discussed at today's meeting were as follows:

   (a) Effective Date

   (b) Disclosure Objective

   (c) Broad Principles for Disclosure

   (d) Threshold for Disclosure: Asserted Claims and Assessments

   (e) Threshold for Disclosure: Unasserted Claims and Assessments

   (f) Threshold for Disclosure: the Effects of Insurance Coverage

   (g) Quantitative Disclosures

   (h) Settlement Negotiations

   (i) Disclosure of Possible Recoveries from Insurance or Indemnification Arrangements.

Issue 1—Effective Date

3. Mr. Elsbree stated that at the September 24, 2008 meeting, the Board decided that any final Accounting Standards Update to amend Section 450-20-50, *Contingencies > Loss Contingencies > Disclosure* (originally issued as FASB Statement No. 5, *Accounting for Contingencies*), will be effective no sooner than for fiscal years ending after December 15, 2009. Mr. Elsbree noted that it may not be feasible for entities to comply with the guidance for this calendar year end.

Staff Recommendation

4. The staff recommends that any final Accounting Standards Update to amend Section 450-20-50 be effective no sooner than for fiscal years ending after December 15, 2010.

Question for the Board

5. Does the Board agree with the staff's recommendation for the effective date?

Board Vote

6. The Board decided not to rule out the possibility of an effective date no sooner than for fiscal years ending after December 15, 2009.

Board Comments

7. Mr. Smith noted that he does not support delaying the effective date for the proposed Accounting Standards Update, because it is not yet known what constituents will be required to disclose. In his view, if the required disclosures are mainly factual in nature, he does not want to rule out the possibility that the new disclosure requirements could be effective for the 2009 year end, noting that SEC registrants will have until March to prepare their disclosures for submission. Mr. Linsmeier agreed with Mr. Smith and noted that it is not appropriate to make a decision about the effective date without knowing what the required disclosures will be or whether it will be necessary to re-expose the Board's decisions on this project.

8. Ms. Seidman stated that aiming for a 2009 effective date may compromise the quality of the disclosures. She noted that the Board has a real chance at enhancing the quality of disclosures about loss contingencies, but rushing deliberations to implement this year could detract from deliberating the issues thoroughly, which may reduce the quality of the disclosure requirements.

9. Mr. Herz commented that at the education session in preparation for this meeting, it appeared that a December 15, 2009 effective date would not be practical. Nevertheless, it may be premature to establish an effective date no sooner than for fiscal years ending after December 15, 2010. Mr. Linsmeier observed that based on the Board's discussions about the effective date, constituents can assume it will be unlikely, but not impossible, that a final Accounting Standards Update on this project will be effective for fiscal years ending after December 15, 2009.

Issue 2—Disclosure Objective

10. Mr. Elsbree stated that the objective in the Exposure Draft was that:

> An entity shall provide disclosures to assist users of financial statements in assessing the likelihood, timing, and amount of future cash flows associated with loss contingencies that are (or would be) recognized as liabilities in a statement of financial position. Those disclosures shall include information about the risks those loss contingencies pose to the entity and their potential and actual effects on the entity's financial position, cash flows, and results of operations.

11. Mr. Elsbree noted that based on the comment letter feedback received, the staff believes the objective, as stated, is not attainable given the limitations of the information that is available to preparers concerning contingencies in the early stages, as well as limitations that arise as a result of attorney-client privilege.

12. Mr. Elsbree said that the staff considered alternative approaches to modifying the Exposure Draft disclosure objective. He noted that the disclosure objective could be based on the version in the *alternative model* that was developed for purposes of the field test.

13. The disclosure objective in the alternative model is as follows:

> An entity shall disclose factual qualitative and quantitative information about the loss contingency to enable a financial statement user to understand the nature of the contingency and its potential magnitude. An entity also shall disclose certain additional information to assist a user in evaluating the likely outcome of the contingency if it would not be prejudicial to do so.

Staff Recommendation

14. The staff recommends that the disclosure objective be based on the *first* sentence of the disclosure objective in the alternative model.

Question for the Board

15. Does the Board agree with the staff's recommendation for the disclosure objective?

Board Vote

16. The Board unanimously agreed with the staff recommendation with the understanding that timing and magnitude will be included in the objective as a primary focus. The

Board also unanimously agreed that the word *factual* should be excluded from the disclosure objective.

Board Comments

17. Mr. Linsmeier noted that timing is important in the history of disclosures and proposed that "timing" be added to the first sentence of the objective. He stated that constituents should disclose the nature of the contingency and the potential timing and magnitude of the outcome. He noted that preparers would not be required to predict timing if it is unknown; however, preparers should disclose factual information about timing if it is available.

18. Ms. Seidman supported focusing on the first sentence of the alternative model objective because, in her view, the Board should establish required disclosures that will not be prejudicial. Under this approach, the second sentence of the alternative model's disclosure objective and a prejudicial exemption would not be necessary.

19. Mr. Leisenring noted that using the word "factual" in the disclosure objective may convey to users a false sense of precision. He stated that not all desired disclosures will necessarily be completely factual. As an example, he noted that a litigant's contentions oftentimes represent **opinions**, not factual information. He commented that even accruals are not always factual but merely a best estimate. Mr. Golden agreed with Mr. Leisenring and suggested that the word "factual" be omitted from the objective such that the objective indicates that preparers "shall disclose qualitative and quantitative information about the loss contingency…" Mr. Golden stated that factual criteria should be established in the broad principles developed in Issue 3.

Issue 3—Broad Principles for Disclosure

20. Mr. Elsbree stated that at the March 6, 2009 roundtables, there seemed to be a broad consensus among users, preparers, attorneys, and accountants that the disclosures about loss contingencies should be based on the following principles:

(a) Contentions versus predictions—disclosures about litigation contingencies should focus on the contentions of the parties, rather than predictions about the future outcome.

(b) Amount of disclosure about a case varies with certain factors—earlier in the life cycle of a case there will be less information to disclose, whereas later in the life cycle there is more information to disclose. Also, as the likelihood and magnitude of the potential loss increase, the robustness of the disclosure also should increase.

(c) Disclosure should provide a succinct baseline summary and tell the reader where to find more detailed information—financial statement disclosures should provide a summary of information that is already publicly available about a case. Additionally, the financial reports should indicate where financial statement users can find more detailed information about a case if they choose to perform additional research.

(d) Disclosure about the contingency should merely report events and generally should not affect the outcome of the contingency itself to the detriment of the entity—the outcome of the contingency ideally should not be affected by the disclosure about the contingency. The disclosure is meant to merely report what is happening related to the contingency.

Staff Recommendation

21. The staff recommends that the Board's decisions about specific quantitative and qualitative disclosure requirements be based on these principles. The staff also recommends that these principles be explicitly stated in the final Accounting Standards Update.

Question for the Board

22. Does the Board agree with the staff's recommendation to include these principles in the final Accounting Standards Update?

Board Vote

23. The Board tentatively agreed to include the first three of these broad principles in the final Accounting Standards Update. The Board noted that the third principle should be subject to certain size constraints.

Board Comments

24. Mr. Smith asked the staff to provide additional background on the third principle. Mr. Elsbree noted that roundtable participants had suggested trying to consolidate the disclosure requirements of Item 103, *Legal Proceedings*, of Regulation S-K and the disclosures in the notes to the financial statements. Mr. Elsbree stated that the Item 103 disclosures include information such as the name of the case, venue, and docket number. With this information, a user could find perform additional research about legal proceedings without having to go through management to get the information. Mr. Elsbree noted that the Item 103 requirements are limited to cases over a certain size. If an entity is a defendant in thousands of cases, it is not practicable to disclose this information for every single case.

25. Mr. Siegel and Mr. Linsmeier stated that disclosing the docket number is important to enable users to perform their research. Mr. Siegel also noted that the subject of hyperlinks had been discussed at the education session and his understanding is that the staff is not suggesting requiring preparers to provide hyperlinks. Mr. Elsbree agreed and said that based on discussions the staff had held with members of the auditing profession, the audit opinion would cover the linked information, and that information could be changed without the auditor's knowledge after the date of the audit report.

26. Ms. Seidman expressed concern that requiring the disclosure of docket numbers might not be appropriate and could get out of control. She suggested entities could provide enough information so users could educate themselves enough to ask management questions about contingencies and obtain the additional information they deem appropriate. Mr. Linsmeier noted that the objective is to provide users with the information they need to perform this research on their own without having to involve

management. He suggested that this principle be modified to include a materiality threshold similar to that in Item 103. He stated that it is important to present user-summarized information about the legal proceedings, not comprehensive disclosures about the entire case, to condense the amount of information disclosed to prevent information overload within the financial statements.

27. Mr. Siegel clarified that this information would only be required for cases that meet the threshold for disclosure. Therefore, he noted, not every case in which an entity is involved would require a docket number to be disclosed. Ms. Seidman noted that it may be necessary to have docket numbers for cases that do not meet the threshold because individual cases may not be material but the aggregate of all the cases may be material. Mr. Golden questioned whether information about the docket should be in audited financial statements.

28. Board members expressed general agreement with the broad principles. Mr. Elsbree indicated that the staff will come back to the Board with proposals for specific disclosure requirements to meet these principles.

29. Mr. Elsbree asked the Board specifically about the fourth principle. Mr. Linsmeier stated that the Board should remove the fourth principle because it results from applying the first principle. He expressed concern that if the fourth principle remained, it may cause preparers to resist disclosing contentions or to override the specific disclosure requirements. Mr. Herz expressed similar views and questioned whether the fourth principle needs to be explicitly stated or whether it will be implied by the type of disclosures the Board ultimately decides should be required. Mr. Smith views the fourth principle as a qualifier of what is meant by *contentions versus predictions*. Board members, excluding Mr. Linsmeier, agreed that it would be more appropriate to include the fourth principle in the Basis for Conclusions, instead of explicitly in the Codification, to provide an explanation of why the Board is changing from the Exposure Draft. Mr. Linsmeier indicated a preference for excluding this principle from both the Codification and the Basis for Conclusions.

30. Mr. Linsmeier asked the staff to clarify the interaction between the second principle and the stated objective of enabling the user to understand the timing and magnitude of a loss contingency. Mr. Elsbree clarified that the issue of timing is incorporated in the second principle because the life cycle of the case will, in part, determine the amount of information available to be disclosed. Mr. Siegel noted that in his view, timing is embedded in the life cycle concept. Mr. Linsmeier also asked for clarification about whether an entity would be required to disclose its assessment of the likelihood of a loss (*remote*, *reasonably possible*, or *probable*). Mr. Siegel replied that an entity would not be required to disclose that assessment, but as its assessment of likelihood changes, the level of detail of the disclosure also should change.

31. Mr. Linsmeier stated that it may be problematic for preparers to disclose settlement offers that may have been made. However, the fact that settlement negotiations are taking place should be a factor to consider when assessing the likelihood and timing of a potential loss in the context of the second principle. Board members generally agreed with Mr. Linsmeier. Mr. Elsbree noted that all information that is available to the entity should be considered when assessing (a) whether to disclose a contingency and (b) how much information to disclose about the contingency. Mr. Elsbree summarized that the first, second, and third principles would be explicitly stated in the Accounting Standards Update, and the staff would develop factors to assist preparers with implementing the principles and the specific guidance. Those factors will include the existence of *bona fide* settlement negotiations and consideration of all available information.

Issue 4—Threshold for Disclosure: Asserted Claims and Assessments

32. Mr. Elsbree said that financial statement users expressed the view that the *at least reasonably possible* threshold in Section 450-20-50 results in delayed disclosure of loss contingencies. He noted that in the Exposure Draft, the Board proposed changing the disclosure threshold to expand the population of loss contingencies that are required to be disclosed.

33. Mr. Elsbree stated the following possible alternatives for the threshold for disclosure:

(a) Leave the threshold in Section 450-20-50 broadly unchanged.

(b) Eliminate the approach that bases the threshold on an assessment of the likelihood of loss as *remote, reasonably possible,* or *probable* and replace it with a threshold based on the overall concept of materiality.

(c) Maintain the existing requirement to disclose loss contingencies whose likelihood of loss is at least reasonably possible and create additional criteria for disclosure of remote loss contingencies that could have a severe or catastrophic effect on the entity. If the Board chooses this approach, the formulation of those criteria for remote contingencies will be discussed at a future Board meeting.

34. Mr. Elsbree commented that a potential approach to (c) would be to require disclosure of a remote contingency if not disclosing the contingency would be considered a material omission of fact.

Staff Recommendation

35. The staff recommends alternative (c) to maintain the existing threshold and add a requirement to disclose remote contingencies under certain circumstances. The staff also recommends clarifying that *at least reasonably possible* has the same meaning as *more than remote*.

Question for the Board

36. Does the Board agree with the staff's recommendation for alternative (c) about the disclosure threshold for asserted claims and assessments and the proposed clarifying language?

Board Vote

37. The Board unanimously agreed with alternative (c) to maintain the existing threshold of disclosure and add a requirement to disclose remote contingencies under certain circumstances. The Board directed the staff to develop criteria for disclosing remote contingencies at a future meeting. The Board also agreed to clarify that *at least reasonably possible* has the same meaning as *more than remote*.

Board Comments

38. Mr. Elsbree noted that the staff will do additional research on the definition of materiality and how it relates to securities law before it asks the Board to discuss the criteria for remote loss contingencies. Mr. Linsmeier stated that this information would be important to help the Board craft the disclosure requirements for remote but material loss contingencies.

Issue 5—Threshold for Disclosure: Unasserted Claims and Assessments

39. Mr. Elsbree stated that in the Exposure Draft, the Board proposed not changing the threshold for disclosure of unasserted claims and assessments other than to replace the language *at least reasonably possible* with *more than remote*.

Staff Recommendation

40. The staff recommends not changing the existing threshold for disclosing unasserted claims and assessments. However, the staff proposes enhancing the existing interpretive guidance on unasserted claims and assessments in paragraph 450-20-55-14 (originally issued as paragraph 38 of Statement 5). The staff recommends adding language to that paragraph to clarify that "an entity should consider all evidence available to it" when determining the degree of probability that a claim will be asserted and an unfavorable outcome could occur. The staff also recommends adding, as an additional example in this paragraph, "the existence of peer-reviewed studies in reputable scientific journals that indicate potential hazards related to the entity's products."

Question for the Board

41. Does the Board agree with the staff's recommendation to provide interpretive guidance about the threshold for disclosure of unasserted claims and assessments?

Board Vote

42. The Board unanimously agreed with the staff recommendation.

Board Comments

43. Mr. Herz suggested that the additional example included in the staff's recommendation should not be limited only to *products*, because potential hazards could affect any aspect of the entity and its operations, not merely its products.

Issue 6—Threshold for Disclosure: Effect of Insurance Coverage

44. Mr. Elsbree acknowledged that the Exposure Draft did not specifically address whether an entity should consider the possibility of recoveries when assessing whether a loss contingency should be disclosed. He noted that insurance coverage is often uncertain and may be subject to litigation with the insurer. Therefore, an entity may be exposed to loss even when it believes the loss contingency is fully covered by insurance.

Staff Recommendation

45. The staff recommends providing interpretative guidance that indicates an entity should not consider the possibility of recoveries from insurance or indemnification arrangements when assessing whether a contingency should be disclosed.

Question for the Board

46. Does the Board agree with the staff's recommendation about providing this interpretive guidance?

Board Vote

47. The Board unanimously agreed with the staff recommendation.

Board Comments

48. None

Issue 7—Quantitative Disclosures

49. Ms. Seidman indicated that she could not participate in the remainder of the Board meeting and stated that she supports the staff's recommendation on all the remaining issues.

50. Mr. Elsbree said that the Exposure Draft proposed to require disclosure of the claim amount or, if there is no claim amount, an entity's best estimate of the maximum exposure to loss. However, he noted that this requirement was opposed by the majority of comment letter respondents. Mr. Elsbree stated the following approaches that the staff has considered for quantitative disclosure requirements:

(a) Maintain the existing requirement to provide "the possible loss or range of loss or a statement that such an estimate cannot be made."

(b) Require disclosure of publicly available factual quantitative information, such as the claim amount or the amount of damages indicated by the testimony of a plaintiff's expert witness.

(c) Require disclosure of nonprivileged factual quantitative information that is available, regardless of whether it is publicly available.

(d) Require an entity to provide an estimate of the possible loss by engaging an external third party to make the estimate based on nonprivileged information.

(e) Require an entity to use a standardized *trading model* to estimate the settlement value of litigation.

(f) Require some combination of the above disclosures.

Staff Recommendation

51. The staff recommends a combination of items (a), (b), and (c) as required quantitative disclosures. The underlying principle is that the disclosure should give users *a sense of the magnitude* of the contingency.

Board Vote

52. All Board members agreed that quantitative disclosure requirements need to be further developed by the staff but should be based on a combination of items (a), (b), and (c) as articulated by Mr. Linsmeier in paragraph 61.

Board Comments

53. Mr. Elsbree clarified that these quantitative disclosures would be required only for those contingencies that meet the threshold for disclosure (as discussed in Issues 5-7).

54. Mr. Elsbree added that the staff will develop clarifying language so that when an entity is evaluating whether or not to disclose a claim amount, it considers all available information. He noted that the existence of a very large claim amount, in and of itself, does not automatically trigger a disclosure requirement. Mr. Elsbree stated that at a future meeting, the staff will ask the Board to redeliberate what will trigger the disclosure of *remote* contingencies and what disclosure would be appropriate.

55. Mr. Linsmeier asserted that *available* information in approach (c) would include a third party's estimate (approach (d)) if one had been obtained or a calculation based on a trading model (approach (e)) if one had been performed. However, he understands that the staff recommendation does not involve *requiring* entities to obtain a third-party estimate or to use a trading model. He made the point that all this information has the potential to be available if an entity obtained it. Mr. Elsbree stated that the staff will modify the language so it reflects the Board's intention to require disclosure of quantitative, relevant facts that provide the reader with a sense of the potential magnitude. He cited the example in comment letter #30 about the widget manufacturer who had entered into a contract to deliver widgets for $1 million as the model for approach (c).

56. Mr. Leisenring stated that sufficient context needs to be required so users can understand the magnitude of the contingency. He referred to the widget example and stated that the $1 million contract amount may not be an important quantitative fact if, for example, the purchaser sues the manufacturer for recovery of $50 billion of lost business

because the widgets were not available. Mr. Elsbree agreed and indicated that in this example, disclosing both amounts may be necessary to provide users with the appropriate context.

57. Mr. Golden noted that approach (a) is what is currently required. He stated that in his view, attorneys must be making some kind of an evaluation about the contingency in order to determine *that such an estimate cannot be made*; therefore, some information must be available. Mr. Golden proposed that if it is determined an estimate cannot be made, an entity should be required to disclose *why* an estimate cannot be made. He noted that he thinks estimates are currently being made but that they are not disclosed because they are considered to be privileged information. Mr. Elsbree stated that an estimate may be considered a prediction and contradict one of the broad principles discussed in Issue 3. Mr. Golden said that his view is that (a) and (c) should be linked; an entity must state why it could not make an estimate. If the estimate is privileged, it does not have to be disclosed.

58. Mr. Linsmeier suggested combining approaches (a), (b), and (c) to require disclosure of the possible loss or range of loss as long as there is publicly available factual quantitative information or if there is nonprivileged factual quantitative information that is available. He is of the view that this requirement would push entities to look at additional sources of information and disclose the information if it meets (b) or (c). If the information does not meet (b) or (c), the entity could state that no estimate could be made because there was no information that met (b) or (c). However, an entity could still decide to disclose the information voluntarily.

59. Mr. Smith questioned why there should be disclosure requirements that the Board knows the entity will not be able to make because the information would jeopardize the contingency. He stated that only information that will not prejudice a case should be required disclosure. Mr. Elsbree stated that there seems to be general agreement among Board members to create disclosure requirements that are not prejudicial so that there would not be a need for a prejudicial exemption. Mr. Elsbree speculated that when entities say *an estimate cannot be made,* they may really mean that a disclosure of the estimate would be prejudicial. Mr. Elsbree stated that some preparers are providing

estimates under the existing guidance in Section 450-20-50 (approach (a)), and the staff is reluctant to remove this requirement and thereby take information away from users that they are already receiving and consider valuable. He suggested that the current guidance (approach (a)) be retained but that the wording could be adjusted. Mr. Siegel noted that the current problem with approach (a) is its implementation in practice.

60. Mr. Elsbree's suggestion that the Board could agree on a tentative decision in favor of (b) and (c) and request that the staff further develop (a) so that users will not lose information they currently receive. Mr. Herz noted that (a) is not consistent with the broad principles because it is predictive. He expressed concern that the principles might be setting up a barrier to discourage disclosure practices that some entities are already following.

61. Mr. Linsmeier stated that there is a difference between (1) an entity estimating and disclosing the actual number or the range and (2) providing nonprivileged factual information (even if not publicly available) that would be relevant to a making an estimate, without the entity making and disclosing the estimate itself. He said that what the staff seems to be trying to get at is disclosure of the inputs to making an estimate that are nonprivileged, factual quantitative information that is available, but that this is not coming through in the wording that the staff proposed. Mr. Linsmeier said that he would be less uncomfortable about keeping (a) intact if the requirement were drafted to say: disclose an estimate of the loss or range or loss, or state that it cannot be reasonably estimated but here are some underlying inputs that are factual, nonprivileged, even if not public, that would be relevant in making an estimate.

62. Messrs. Herz, Siegel, and Smith generally agreed with Mr. Linsmeier's proposed approach. Mr. Elsbree stated that the staff will draft a proposed requirement based on Mr. Linsmeier's comments and will ask the Board to discuss that draft language at a future meeting. Mr. Linsmeier commented that, in his view, relevant inputs in this context would include inputs to calculations made under approaches (d) and (e) as well.

63. Mr. Herz noted that an entity could disclose its relevant history or the outcomes of similar cases to give the user a sense of the possible loss. Mr. Linsmeier observed that it may be necessary to include sample disclosures for certain fact patterns in the final

guidance. Mr. Herz concurred and noted that a sample disclosure for (c) would be beneficial.

Issue 8—Settlement Negotiations

64. Ms. Milne stated that the Exposure Draft did not require entities to disclose information about settlement offers. She noted that disclosing settlement offers could be misleading, as they are often used as a negotiating tool and may significantly differ from the entity's ultimate exposure. In addition, Ms. Milne noted that an attorney at the March roundtable discussions said that settlement negotiations are nuanced and very delicate, therefore any disclosures about the negotiations, particularly about settlement offers, are likely to affect the negotiation.

Staff Recommendation

65. The staff recommends that the Board not require disclosure of information that settlement negotiations are occurring or that settlement offers have been made.

Board Vote

66. The Board unanimously agreed that information about settlement negotiations should not be required disclosure for loss contingencies.

Board Comments

67. Mr. Herz noted that even though settlement negotiations will not be required to be disclosed, the existence of settlement negotiations should be one of the factors considered by an entity when determining what information should be disclosed.

Issue 9—Disclosure of Possible Recoveries from Insurance or Indemnification Arrangements

68. Mr. Elsbree stated that the Exposure Draft proposed a requirement to disclose 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. He said that defendants in federal court and in some state courts are required to disclose information about insurance coverage to the plaintiff in discovery. Mr. Elsbree

also noted that information about insurance coverage is generally not admissible in court as evidence of the defendant's liability, regardless of how the plaintiff obtains it.

Staff Recommendation

69. The staff recommends that disclosure of information about possible recoveries from insurance and other sources be required *if and to the extent* that the information has been provided to the plaintiff in discovery. To the extent that insurance coverage is subject to dispute with the carrier, this information should be disclosed as well, following the principle of disclosing contentions rather than predictions.

Board Vote

70. The Board unanimously agreed that information about possible recoveries from insurance and other sources be required *if and to the extent* that the information has been provided to the plaintiff in discovery.

Board Comments

71. Mr. Elsbree noted that an attorney had raised the issue that if financial statements were already submitted as evidence in trial, information in those financial statements about insurance coverage could potentially prejudice the jury. Mr. Herz questioned whether including the information about insurance coverage in audited financial statements would make it more admissible in court. Mr. Linsmeier stated that, based on his understanding of the staff's research, the jury could not consider the insurance information as evidence of the defendant being liable. Mr. Herz commented that the law would say it is inappropriate to find someone liable based on the fact that they have enough insurance to cover a large judgment.

Follow-up Items:

None

General Announcements:

None