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



LETTER OF COMMENT NO. 158



Re: Proposed amendment of FASB Statements No. 5 and 141(R), File Reference No. 1600-100

Dear Mr. Golden:

Amgen Inc. appreciates the opportunity to present its comments on the June 5, 2008 draft amendment to FASB Statements No. 5 and 141(R). In our view, the serious unintended and negative consequences of the proposed disclosure requirements concerning loss contingencies in pending or threatened litigation far outweigh any likely benefit of those requirements.

Amgen is a leading human therapeutics company in the biotechnology industry. It is a Fortune 500 company with world-wide annual sales of over \$14 billion in 2007. As is common for a publicly traded company of its size in its industry, Amgen has been involved in complex litigation on a variety of intellectual property, commercial, and securities matters. This litigation experience gives Amgen a meaningful perspective on the proposed amendment.

A major premise of the proposed amendment with respect to the disclosure of litigation loss contingencies is that the maximum exposure to loss (required disclosure in the absence of the amount of claim or assessment) and the possible loss or range of loss (optional disclosure) can be reliably estimated. That premise is not correct, at least for the type of complex litigation that could have a significant impact on the financial performance of a major company, and thus are likely to be a matter of interest to investors or other users of financial statements. Complex litigation involves too many uncertainties to be able to reliably estimate potential losses from litigation. This is particularly so during the initial often years-long pretrial stage of complex litigation, during which the facts that significantly drive the litigation results are still to be uncovered, and the myriad of often outcome-determinative procedural issues - such as questions of venue, choice of law, class certification, and dismissal of defective claims - are still being resolved. The likely risk of loss in litigation also remains inherently uncertain even when a case is ready for trial. Quite simply, the uncertainty of litigation outcomes in America is a stubborn fact that undermines the proposed amendment at the outset.

Even if some companies believe (mistakenly, in our view) that they can reliably estimate their maximum exposure to loss or the possible loss or range of loss from pending or threatened litigation, disclosure of those estimates would seriously compromise their positions in such litigation. Specifically, providing such information would allow one's litigation opponent to extract a higher settlement than if the opponent were not privy to the company's internal assessment of the potential value of the case. Of course, the vast majority of civil lawsuits are settled rather than litigated to judgment.

A company that chose not to settle, but instead to litigate to judgment, also would be substantially disadvantaged in its defense of the case by the disclosures of the proposed amendment. The proposed amendment would require that a company disclose not only the dollar amount of the claim or assessment or the estimated maximum exposure to litigation loss, but also disclose its "qualitative assessment" of the case, including, in most circumstances, "a description of the factors that are likely to affect the ultimate outcome of the [litigation loss] contingency along with their potential effect on the outcome," "a qualitative assessment of the most likely outcome," and the "significant assumptions" made in estimating the amounts disclosed and in assessing the most likely outcome. This qualitative information would lay bare much of the company's litigation strategy -e.g., its internal assessment of what factors are likely to drive the result of the litigation - enabling its litigation opponent to adjust its strategy accordingly and substantially increase its own chances of success in the litigation. Additionally, these disclosures will likely be based, at least in part, on information provided by the company's legal counsel. Once these disclosures are made, a company faces the likelihood that a court will deem the disclosures have waived the attorney-client privilege.

The proposed amendment acknowledges the possibility that its new disclosures for litigation loss contingencies may disadvantage a company's defense of the litigation, and the amendment includes two proposed solutions for this problem. The first proposed solution is to permit the disclosing entity to report its potential litigation losses in more highly aggregated figures, thus supposedly hiding the entity's assessment of any one piece of litigation. That is not an adequate solution for at least three reasons. First, the aggregate figures, if based on estimates of the maximum exposure to loss, likely could not be audited without giving auditors access to the privileged attorney-client communications that established the potential loss level for each individual case. Providing those attorney-client communications to outside auditors may very well waive the privilege of those communications, thus allowing litigation opponents to obtain case-specific potential loss information through normal litigation discovery. Second, it is not unusual for a company to be facing only one potentially large litigation loss, and, in that circumstance, any sophisticated plaintiff's counsel can make an educated guess as to the source of the aggregation thus reaching a conclusion as to the approximate value of the predicted large loss. Third, aggregating inherently unreliable estimates of case-specific litigation losses would compound this unreliability, and result in information that likely will be even more meaningless to the users of financial statements.

The second proposed solution is to allow the entity to disclose somewhat less information about potential litigation losses in presumably "rare" circumstances where providing all of the normally required information "may be prejudicial" to the company's position in that litigation. This is not a practical solution because, as discussed above, it will not be the "rare"

circumstance, but rather will be the norm, in which providing the amendment's required disclosures will be "prejudicial" to the company's position in the litigation, because those disclosures will reveal much about the company's assessment of the case and its litigation strategy. Furthermore, this exception that allows a company to disclose less about potential litigation losses still requires the disclosure of critical information that likely will prejudice the company's position in litigation. Thus, even under this exception for "rare" circumstances, the company must disclose both a quantitative assessment of the claim (i.e., an estimate of the entity's "maximum exposure to loss," except when the litigation seeks recovery of a specified claim amount, which is rare in complex litigation) and a qualitative assessment of the claim (e.g., "a description of the factors that are likely to affect the ultimate outcome of the litigation"). These disclosures will reveal important elements of the company's legal strategy and, therefore, compromise the company's position in the case.

The proposed amendment would have the further seriously adverse consequence of undermining the protections of the attorney-client privilege for communications between the company and its attorneys concerning the risks of litigation. In order to act in the best interest of its shareholders, a company should obtain full and candid legal advice concerning pending and threatened litigation. Companies are able to receive that advice now because the attorney-client privilege ensures that such candid and confidential advice need not be shared with the company's litigation opponent. That would all change, for the worse, under the proposed amendment. Companies would know that the legal advice it obtains on litigation risks would, at the very least, be shared with its litigation opponents in the summary form of the proposed amendment's mandatory disclosures of litigation risk assessments, and, possibly worse, result in the broader waiver of the attorney-client privilege for the attorney's original advice to the company. This erosion of the protection of the attorney-client privilege would result in companies being less willing to request detailed legal analyses of litigation risks, lest those details become a boon to the company's litigation opponent. It also would result in attorneys being less willing to provide candid, detailed assessments of litigation risks, given that the assessments often will to some degree become public and, because of the inherent uncertainty of litigation, often will be wrong. None of these results are in the interest of the company, its shareholders, or the legal system.

Another unintended negative consequence of the proposed amendment would be a new class of often baseless litigation that would result from mandating financial statement disclosures of the estimated maximum exposure to losses in pending or threatened litigation when there is no amount of claim or assessment. Because litigation outcomes are inherently uncertain, even the best efforts of companies to estimate those outcomes will turn out to be wrong in many, if not most, cases. That inevitably will lead to litigation over whether the company's estimates of the maximum exposure to litigation loss were knowingly misleading. While companies should not be shielded from the consequences of knowingly misleading statements, companies also should not be required to "predict the unpredictable," and thereby attract the inevitable contingent of baseless lawsuits challenging those predictions.

The FASB's Exposure Draft on the proposed amendment does not demonstrate any pressing need for this amendment that could possibly outweigh the serious problems discussed above. That Draft notes "concerns" expressed by users of financial information that they do not have adequate information concerning the "likelihood, timing, and amount of future cash flows

associated with loss contingencies." But the Draft does not seriously address whether the information those users of financial information wish to have can in fact be made available or made available without substantial detriment to the company.

For the above reasons, the proposed amendment likely would seriously prejudice the litigation positions of disclosing companies, while providing little, if any, helpful information to users of financial statements.

Thank you for the opportunity to present these views on this matter.

Very truly yours

David J. Scott