Kodak



LETTER OF COMMENT NO. 69

August 6, 2008

Technical Director – File Reference No. 1600-100 Financial Accounting Standards Board 401 Merritt 7 P.O. Box 5116 Norwalk, CT 06856-5116

RE: FASB Exposure Draft: Proposed Statement of Financial Accounting Standards, Disclosure of Certain Loss Contingencies, an amendment of FASB Statements No. 5 and 141 (R)

Eastman Kodak Company appreciates the opportunity to comment on the exposure draft (ED) of the FASB's Proposed Statement of Financial Accounting Standards, *Disclosure of Certain Loss Contingencies, an amendment of FASB Statements No. 5 and 141(R)*.

We believe that the current disclosure requirements of FASB Statement No. 5, Accounting for Contingencies are appropriate in the context of the current standard and that any modification to the disclosure requirements should come in concert with the FASB's planned reconsideration of the recognition and measurement guidance for certain non-financial liabilities, similar to the International Accounting Standards Board's approach. However, if the FASB continues with an amendment to the disclosure requirements of Statement 5 before reconsidering its recognition and measurement requirements, then we believe that disclosures related to loss contingencies should be less prescriptive than the ED proposes. The ED notes that disclosure should be provided 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" and requires specific quantitative and qualitative information to be disclosed at each reporting period. However, at any financial statement reporting date each contingency that a reporting entity faces could have very unique characteristics that impact what may be the most meaningful disclosures to financial statement users such as the intentions of a claimant or potential claimant, litigation strategy, the particular tendencies of judges or juries in the court where that litigation was filed, etc. Therefore, we believe that the most meaningful and relevant quantitative and qualitative disclosures to assist financial statement users in assessing likelihood, timing, and amount of future cash flows associated with loss contingencies will vary based on the facts and circumstances related to each contingency at each reporting date.

Additionally, the specific quantitative and qualitative disclosures mandated for each contingency would be misleading without the inclusion of contextual information that is likely to be prejudicial. Whereas, if the most meaningful and relevant quantitative and qualitative disclosures specific to each contingency were left to the judgment of the



financial statement issuer a disclosure principle could be met while minimizing the need to apply prejudicial exemptions.

We believe that the negative consequences of the ED will outweigh any benefits for reasons that include the following:

- At the early stages of litigation, attempting to quantify potential losses is highly speculative and therefore not meaningful to financial statement users;
- Requiring disclousure based on damages claimed in litigation is misleading to financial statement users because such claims are often inflated and bear no relation to the value of the claim;
- Requiring a financial statement issuer to disclose why it disputes an inflated claim may, by necessity, require premature disclosure of the financial statement issuer's litigation strategy;
- Requiring disclosure based on a financial statement issuer's position in settlement discussions will discourage frank and open settlement negotiations; and
- The proposed disclosures may discourage settlement discussions altogether which will prolong the litigation process causing financial statement issuers to incur additional legal expenses.

If the FASB continues with an amendment to the disclosure requirements of Statement 5 before reconsidering its recognition and measurement requirements we believe that a principles based approach would prove more beneficial than uniform disclosure rules being applied to varied situations.

As requested, we have provided comments on the following 14 questions (shown in this letter in bold type) noted in the ED and believe our responses further support our concerns noted above.

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?

We believe that the additional disclosure requirements proposed by the ED are not sufficiently beneficial to justify the incremental costs associated with the ED's requirements. As previously noted, and as more fully described in our responses to the following questions, we believe the level of benefit provided by the proposed disclosures would vary depending on the specific facts and circumstances of any given contingency and that in many cases the required disclosures may cause more confusion than clarity.

Incremental out-of-pocket costs would include the cost of implementing and maintaining enhanced analysis and disclosure controls of all contingencies, including those bearing remote possibilities of loss. This cost would include, on a quarterly basis, increased fees

from external legal counsel, both to support disclosure control processes and the external audit function.

More significant than the out-of-pocket costs is the potentially detrimental impact to public companies following U.S. GAAP that could be forced to provide sensitive, and potentially prejudicial, information to adversaries and competitors. Moreover, the required disclosures could ultimately be the source of additional claims and litigation.

If an amendment to the disclosure requirements of Statement 5 is made before reconsideration of the recognition and measurement criteria, we believe that more principled guidance, that allows for judgment in its application, would prove more beneficial and less costly than the specific quantitative and qualitative disclosures proposed by the ED.

2. Do you agree with the Board's decision to include within the scope of this proposed Statement obligations that may result from withdrawal from a multiemployer plan for a portion of its unfunded benefit obligations, which are currently subject to the provisions of Statement 5? Why or why not?

We have no comments related to this question.

3. 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?

We believe that disclosure should not be required for any contingency if the likelihood of loss is remote. We believe the benefit to financial statement users of having a more complete understanding of remote risks does not outweigh the incremental burden on financial statement issuers that this requirement causes. In addition, explanations as to why financial statement users should discount these remote risks may be prejudicial to a financial statement issuer's position in litigation.

If the disclosure requirement is retained, we believe that the FASB should clarify paragraph 6 of the ED to indicate that disclosure is required for loss contingencies (regardless of likelihood of loss) with the potential to have a significantly disruptive effect on the financial health or operations of a financial statement issuer within one year as described in Paragraph A13 of the ED.

The threshold for this disclosure, as currently proposed, could be interpreted to be contingencies that could have a severe impact upon the operations of the financial statement issuer and that are expected to be resolved within one year, regardless of whether the expected resolution could have a severe impact. As an example, we do not believe this disclosure should include expected resolutions of frivolous litigation that would result only in token payment or judicial dismissal. To illustrate, consider a

claimant seeking injunction requiring an entity to cease operations. Assume the financial statement issuer expects to resolve the complaint either through a token payment or through summary legal dismissal shortly after period end, but that absent a minor settlement or dismissal, resolution would not occur in the near term. A literal interpretation of the ED would require disclosure as the financial statement issuer expects the contingency to be resolved in the near term and the contingency (injunction to cease operations) has the potential to have a severe impact on the financial statement issuer's operations, however remote this potential.

4. 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.

4.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?

We do not believe this change would improve the reporting of quantitative information about loss contingencies.

In the basis for conclusions, the ED notes that the claim or assessment amount is an objective amount that is often publicly available and that provides relevant information about the maximum potential for loss. We do not believe that disclosure of the claim or assessment amount necessarily provides relevant information about the maximum potential for loss because a claim or assessment amount may bear no relation to a maximum potential for loss (please refer to our response to question 5 for additional comments related to the relevance of the maximum potential for loss).

Requiring disclosure of an exaggerated claim or assessment amount would in turn require financial statement issuers to provide an explanation of why such a claim amount is unlikely to be incurred. While the ED notes that financial statement users have indicated a preference for a highly uncertain estimate supplemented with a qualitative description, that qualitative description would not necessarily counterbalance disclosure of what may be an exaggerated claim amount. The qualitative description may be difficult for financial statement users to fully comprehend, and therefore not meaningful, as the technical merits may be based on a variety of disciplines (for example engineering or an interpretation of the law in a foreign jurisdiction). In addition, the explanation, in an effort to make disclosure of an exaggerated claim or assessment as meaningful as possible may put the financial statement issuer at risk of revealing aspects of its thinking to its adversary in the proceedings, may be found to be admissible in evidence against the

financial statement issuer in the proceeding itself, may alter the outcome of the proceeding, may constitute waivers of attorney-client privilege or work product immunity, and may ultimately be the source of additional claims and litigation against the financial statement issuer.

The ED suggests that disclosure of a reasonable range of possible loss could help to put an exaggerated claim amount in context, however, as noted in our response to question 4.b., providing a meaningful range of possible loss will be no more possible than under Statement 5's current requirements.

4. 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?

Statement 5 requires the disclosure of ranges of estimates when such can be determined. Restating this requirement more prescriptively does not generate better or more useful estimates where none are realistically available. We believe that requiring disclosure of the possible range of loss does not provide relevant information and could lead to extremes being disclosed on either end of the range. Aggregation of like contingencies could lead to even more extreme ranges, especially if remote contingencies are included in the aggregation. Providing extreme ranges does not meet the ED's stated objective as it fails to provide the financial statement user a meaningful and relevant basis for conclusion and could subject the reporting entity to the legal concerns noted in our response to question 4.a. We therefore agree that disclosure of a potential range of loss should be optional and not required.

4. c. If you disagree with the proposed requirements, what quantitative disclosures do you believe would best fulfill users' needs for quantitative information and at the same time not reveal significant information that may be prejudicial to an entity's position in a dispute?

We believe that prescriptive requirements should not be dictated for each contingency as discussed in our response question 1. Financial statement issuers should be required to disclose the most relevant quantitative and qualitative information, if any meaningful quantitative information exists, for the specific facts and circumstances of each significant contingency when there is at least a reasonable possibility that a loss may have been incurred. We believe that the appropriate level of quantitative and qualitative information to be disclosed varies not only based on likelihood of outcome of a specific contingency but also based on other facts and circumstances specific to each contingency. For example, factors such as status of litigation (i.e. if discovery is complete) and settlement negotiations should also be considered when assessing the relevance of various quantitative and qualitative information.

5. 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?

We do not believe that a financial statement issuer can or should be relied upon to provide a meaningful and reliable estimate of the maximum exposure to loss for each loss contingency that does not have a specific claim amount. While disclosure of an estimated maximum exposure to loss may be meaningful in certain situations, we believe consideration of the specific facts and circumstances related to each contingency helps to guide financial statement issuers to provide the most meaningful and relevant disclosure. We believe that requiring an estimate of the maximum exposure to loss may very well mislead financial statement users as a most likely range of outcomes would typically be very different than a maximum exposure. It should also be noted that if litigation were to go to a jury, the outcome could be highly unpredictable. In addition, this disclosure may provide prejudicial information to claimants and potential claimants, could lead to waivers of attorney-client privilege and lawyer's work product immunity, and could subject the financial statement issuer to risk of derivative litigation breaching the fiduciary responsibility to current stakeholders. If a claimant is unable or unwilling to establish a claim amount, we do not believe it is appropriate to require the financial statement issuer to disclose its own estimate. Financial reporting should be relevant because of its predictive or confirmative value; we do not believe that this disclosure necessarily provides either.

6. 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?

Settlement offers may be made, withdrawn, countered and rejected many times over the course of negotiations. They often bear no relationship to the final settlement terms. Disclosure of preliminary offers could be misleading. Very often settlement offers are made under strict confidentiality terms to avoid the risk that either party to the litigation might try to introduce the offer into evidence. Requiring disclosure of settlement offers could discourage settlement discussions and therefore unnecessarily prolong the litigation process. We believe that this disclosure would be more likely to have negative consequences for investors than provide relevant disclosures to financial statement users and would not meet the disclosure principle. We also believe that litigants could use mandatory disclosure of settlement offers as leverage in negotiations. By way of example, a plaintiff offers an unrealistic settlement offer to coincide with the defendant's period end to force an unfavorable disclosure. We therefore believe that disclosure of settlement offers made by either party should not be required disclosure.

7. 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 believe any benefit derived by financial statement users from a tabular reconciliation would be overwhelmed by the detrimental impact the required disclosures could have on the financial statement issuer, when considered with the qualitative disclosure requirements.

The level of detail required in the table could provide adversaries with insight into the entity's strategy regarding potential settlements. Gross increases in loss contingencies resulting from changes in estimates can pinpoint the vulnerability of the entity to a particular issue. Further, disclosing gross cash payments or settlements could also lead additional parties to pursue claims based on the relative success of a prior claimant. The table requirements coupled with the requirement to provide a qualitative description of significant activity virtually assures that the financial statement issuer's legal strategies and vulnerabilities will be laid bare for use by any and all current and potential claimants. As noted in our response to question 9, we do not believe the prejudicial exemption provides sufficient relief from this, or other proposed disclosures.

8. 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?

A prejudicial exemption is, in our view, mandatory as without it the ED would require a financial statement issuer to strike an impossible balance between its fiduciary responsibilities to protect the interests of its existing capital providers and faithful representation in its financial reporting to all existing and potential capital providers.

9. 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?

We do not agree with the two-step approach in paragraph 11. We do not believe the first step, aggregation at a level higher than by the nature of the contingency, will provide sufficient relief as the required qualitative disclosures related to specific contingencies will be transparent, especially in situations where a single contingency overwhelms other contingencies. We believe that the second step, foregoing prejudicial disclosures, is not sufficient because the "exemption" continues to mandate disclosure of the claim amount or maximum exposure to loss; description of loss contingencies; the basis, status, and anticipated timing of resolution of the contingency; and a description of the factors likely to affect the ultimate outcome and their potential impact on the outcome. We believe the exemption should simply apply to disclosure that would be prejudicial, consistent with IAS 37 that limits the required disclosure to the "general nature of the dispute, together with the fact that, and reason why, the [prejudicial] information has not been disclosed."

10. 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?

For the reasons stated throughout this letter we do not expect exercise of the prejudicial exemption to be rare and therefore suggest removing an expectation of frequency of application from the standard.

11. Do you agree with the description of *prejudicial information* as information whose "disclosure... could affect, to the entity's detriment, the outcome of the contingency itself"? If not, how would you describe or define *prejudicial information* and why?

We do not agree with the ED's description of prejudicial information. The prejudicial exemption only speaks to the potential impact of the specific "contingency itself" and does not provide relief in view of the impact on other related contingencies. It takes a narrow view of the detrimental impact that the proposed disclosures could have on the entity. For instance, disclosures of intended or actual settlements with one party could lead others to file suit in copycat fashion.

The description of prejudicial information should be expanded to include information that could be detrimental to the outcome of the contingency itself or other contingencies in a manner similar to IAS 37 which states: "in extremely rare cases, disclosure of some or all of the information required by paragraphs 84 – 89 can be expected to prejudice seriously the position of the entity in a dispute with other parties on the subject matter of the provision, contingent liability or contingent asset."

12. 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?

For the reasons noted in our response to question 7 we do not believe that a tabular reconciliation should be required. However, if the tabular reconciliation is ultimately required, we believe that interim disclosures, for all of the proposed requirements, would only be appropriate to the extent there are significant changes from the annual disclosures, consistent with existing Securities and Exchange Commission rules and regulations.

13. 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?

As previously noted, we do not believe that an amendment to the disclosure requirements of Statement 5 should prescribe required disclosures for each contingency, but should afford financial statement issuers with the ability to exercise judgment with regards to the most meaningful, relevant, and balanced disclosures in each specific circumstance.

14. 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?

We do not believe that it is operational for entities to implement the proposed statement for fiscal years ending after December 15, 2008 due to the increased scope and depth of the proposed requirements. Companies will be required to monitor, track and obtain a larger population of legal opinions and strategies in a controlled manner while protecting the privileged status of the information. This includes developing a best estimate of the maximum exposure to loss when no claim or assessment amount has been identified. Implementation requires a thoughtful and measured approach ensuring integrity, confidentiality and completeness. This is further complicated for multi-national entities.

We hope these comments are useful. If you would like to discuss these items please feel free to contact myself at (585)724-9025 or Mary Squires of our Accounting Research and Policies Group at (585)724-1970.

Sincerely,

EASTMAN KODAK COMPANY

Eric Samuelo

Eric H. Samuels Assistant Controller