



September 20, 2010

**VIA ELECTRONIC MAIL**

Technical Director – File Reference No. 1840-100  
Financial Accounting Standards Board  
of the Financial Accounting Foundation  
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**Re: Comments on Exposure Draft on Proposed Accounting Standards Update, Contingencies (Topic 450), Disclosure of Certain Loss Contingencies**

To Whom It May Concern:

Wilson Sonsini Goodrich & Rosati (“**WSGR**”) appreciates the opportunity to respond to the Exposure Draft on the Proposed Accounting Standards Update, *Contingencies (Topic 450), Disclosure of Certain Loss Contingencies* (the “**Exposure Draft**”). We appreciate the Board’s efforts to address some of the concerns commentators had with the previous exposure draft on this topic in 2008, File Reference No. 1600-100 (the “**2008 Exposure Draft**”). We continue to have concerns with the current Exposure Draft, however, including some of the concerns we had with the 2008 Exposure Draft.

WSGR endorses the comments submitted by the American Bar Association in its letter to the Financial Accounting Standards Board (“**FASB**”) dated September 20, 2010 (the “**ABA Letter**”). In addition to the concerns noted in the ABA Letter, WSGR has the following additional concerns regarding the Exposure Draft’s approach to the disclosure of contingencies arising from pending or threatened legal claims:

1. We believe that the proposed amendments are very likely to put strains on the “Treaty”<sup>1</sup> between the ABA and the AICPA that has governed lawyers’ responses to auditors’ inquiries for over 30 years. We believe that proposed amendments in the Exposure Draft will negatively impact lawyers’ responses to auditors under the Treaty. As a practical matter, because the current standards for judging a loss contingency to be either “probable” or “remote” are so high, most loss contingencies fall into the category of “reasonably possible.” In addition,

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<sup>1</sup> The “Treaty” is comprised of two documents: the ABA Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information (the “**Statement of Policy**”), adopted by the ABA Board of Governors in 1975, and the AICPA Statement on Auditing Standards No. 12, adopted in 1976.  
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legal counsel provides an estimate of loss or range of probable loss under the applicable standards of the Treaty only when the attorney concludes that the probability of inaccuracy of the estimate is slight. Significant litigation, therefore, is usually disclosed in the financial statement notes on a factual basis that describes the nature and, when specified, amount of the claims, the status and progress of the litigation, and the company's responses and defense posture. Where no accrual is being made, the issuer has in effect determined that, based on information currently available to it, the matter will not have a material adverse effect on the issuer's financial position or results of operation. The Exposure Draft, while improving upon the 2008 Exposure Draft in some regards, still requires both qualitative disclosure regarding litigation determined to be "reasonably possible," and even remote loss contingencies in certain situations, as well as an estimate of loss or range of loss or an explanation as to why such an estimate cannot be made. We believe that mandating a qualitative assessment and an estimate of loss will result in the kind of risk-adverse disclosure that will likely embolden plaintiffs and frustrate settlement discussions. In addition, because the new standards will likely put pressure on counsel to provide qualitative analysis and loss estimates, beyond the guidelines of the Treaty, counsel may well be put in an adversarial relationship with its client in weighing the requirements and risks of disclosure (*e.g.*, underestimating loss) against the interests of protecting the client and preserving the privilege. The likely net result will be to substantially weaken the fundamental principles articulated in the Treaty.

2. We believe the proposed amendments in the Exposure Draft, like the proposed amendments in the 2008 Exposure Draft, may also impact the role of Exchange Act Rule 13b2-2 with respect to the manner in which lawyers respond to auditors' inquiries. Prior to the amendments directed by Section 303 of the Sarbanes Oxley Act of 2002, the standard applicable to lawyers when responding to auditors was that they could not "knowingly" (*i.e.*, a fraud standard) participate in a violation by the client of the disclosure rules. However, Exchange Act Rule 13b2-2 now imposes a simple negligence standard on attorneys where they "know or should know that their conduct, if successful, could result in rendering the issuer's financial statements materially misleading" (SEC Release No. 34-47890). Given both the negligence standard imposed by Rule 13b2-2 and the substantial litigation risks to lawyers associated with underestimating the exposure for a particular claim, we believe that the resulting qualitative disclosure and loss estimates provided by lawyers are likely to be overly conservative and not necessarily representative of a Company's actual exposure. This will most certainly put strains on the attorney-client relationship and may ultimately lead to a chilling effect on communications between a Company and its attorneys.

For these reasons, as well as the concerns outlined in the ABA Letter, WSGR urges FASB not to adopt the amendments as proposed.

Thank you for considering our view on this critical subject. We would be pleased to discuss our comments and to answer any questions that FASB may have. Please do not hesitate

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to contact Mark Bertelsen, Keith Eggleton or Richard Blake at 650-493-9300 regarding our submission.

Sincerely,

*Wilson Sonsini Goodrich & Rosati*  
WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation