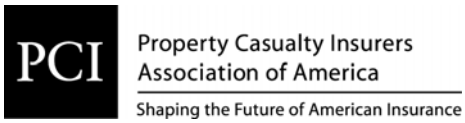


August 20, 2010

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

Re: File Reference No. 1840-100 – Proposed Accounting Standards Update—Disclosure of Certain Loss Contingencies, an amendment of Contingencies (Topic 450)

Dear Mr. Golden:

The undersigned six insurance trade organizations, listed below, appreciate the opportunity to comment on the Exposure Draft of the Proposed Accounting Standards Update, *Disclosure of Certain Loss Contingencies, an amendment of Contingencies Topic 450* ("Exposure Draft" or "Proposed Standard"). We represent a diversity of industry perspectives including privately owned, publicly traded, and policyholder owned mutual insurance entities that are subject to statutory accounting. Statutory accounting is parallel to and strongly affected by GAAP; therefore, we have an enhanced interest in the outcome of this Proposed Standard.

- The American Council of Life Insurers (ACLI) is a trade association with more than 300 member companies representing over 90 percent of the assets and premiums of the U.S. life insurance annuity industry.. ACLI member companies are leading providers of retirement and financial security products, including life, disability income, and long-term care insurance; annuities; reinsurance; IRAs; and pensions such as 401(k), 403(b), and 457 plans.

- The American Insurance Association (AIA) is a property and casualty insurance trade organization representing 300 insurers that write more than $117 billion in premiums each year. AIA member companies offer all types of property and casualty insurance, including personal and commercial auto insurance, commercial property and liability coverage for small businesses, workers' compensation, homeowners' insurance, medical malpractice coverage, and product liability insurance.

- The Group of North American Insurance Enterprises (GNAIE) consists of leading insurance companies including life insurers, property and casualty insurers, and reinsurers. GNAIE members include companies who are the largest global providers of insurance and substantial multi-national corporations. All are major participants in the U.S. markets.

- The National Association of Mutual Insurance Companies (NAMIC) is a full-service national trade association serving the property and casualty insurance industry with more than 1,400 member companies that underwrite more than 40 percent of the property and casualty insurance premium in

the U.S. NAMIC members are small farm mutual companies, state and regional insurance companies, risk retention groups, national writers, reinsurance companies, and international insurance giants.

- Property and Casualty Insurers Association of America (PCI) is a property and casualty insurer trade association, representing over 1,000 companies that write 41 percent of the nation's automobile, homeowners, business, and workers' compensation insurance.

- The Reinsurance Association of America (RAA) is a non-profit trade association of property and casualty reinsurers and reinsurance intermediaries. RAA underwriting members and their affiliates write more than two-thirds of the gross reinsurance coverage provided by U.S. professional reinsurance companies.

We appreciate that the Board has listened to many concerns that we and others have expressed during the last exposure period and has released an Exposure Draft that takes a step in a more agreeable direction. However, we remain concerned that many of the expanded disclosures are likely to be misleading and may present a distorted view of a company's true financial position. Furthermore, while the Board has made an effort to reduce prejudicial disclosures or disclosures that could result in a waiver of attorney-client privilege, there are still instances that remain in the Proposed Standard, such as the continued inclusion of the tabular rollforward for public companies and the addition of the requirement to disclose amounts accrued for all contingencies.

EXECUTIVE SUMMARY:
In addition to the above thoughts, we respectfully request consideration of the following recommendations:

- The tabular reconciliation and disclosure of amounts accrued should not be required. The information could be prejudicial, privileged, and could result in the disclosure of attorney work product. The ability to aggregate does not fully address these concerns.
- Quantitative Disclosure – amount of claim or testimony of expert witnesses is not decision useful to financial statement users.
- Qualitative Disclosures- the information should only be required to be disclosed if it is publicly available, similar to the quantitative information.
- The effective date should be delayed until 2011 for public entities.

We elaborate on these thoughts and address additional concerns below.

TABULAR RECONCILIATION

The Proposed Standard requires public reporting entities to disclose "reconciliations by class, in a tabular format, of recognized (accrued) loss contingencies," which includes disclosure of accruals, changes in accruals, and settlements paid. We expressed several concerns with this proposed requirement in our prior comment letter. The Board noted in the Background Information and Basis for Conclusions BC 31 that the Board feels the ability to aggregate by class of contingencies should address concerns about prejudicial disclosure of individual contingencies. We respectfully disagree with this assertion.

For many smaller entities there will likely be an insufficient number of contingencies to afford protection through aggregation. Even at a highly-aggregated level for a large company involved in a significant number of proceedings, we are concerned that opposing counsel could analyze facts about a proceeding available in the public domain (e.g., date of filing a claim, nature of the claim, amount of the claim), together with information disclosed in the financial statements and periodic changes in those disclosures, and reach conclusions that could affect, to the reporting entity's detriment, the defense of the proceeding and the outcome of the contingency. Exacerbating this problem is the requirement for entities with quarterly financial reporting requirements to disclose this information more frequently than annually. The added frequency of disclosure only enhances the ability of opposing counsel to isolate information relating to the case.

For a relatively small number of entities, aggregation of all litigation claims might afford the reporting entity some protection. For the majority of entities, including smaller entities, however, there may not be enough material litigation or contingencies accrued (as applicable to the tabular reconciliation requirements) that meets the disclosure threshold, in order for aggregation to provide the protection of masking the details of the underlying claims, as the Proposed Standard suggests. Careful tracking of the periodic changes in the aggregated loss contingencies can provide plaintiffs with confidential and highly prejudicial information. For example, with regard to the tabular reconciliation, if the aggregated estimated liability at the end of the second quarter were $25 million and the aggregated estimated liability at the end of the third quarter increased to $35 million, opposing counsel could conclude, potentially incorrectly, that the court's denial of the entity's motion for summary judgment has caused the reporting entity to add $10 million to its estimated liability. That information, in turn, could provide opposing counsel with an advantage in settlement negotiations as it will use this data, whether accurate or not, as a floor in the negotiation process.

We continue to maintain that this information is not useful to the financial statement users. Aggregating unique liabilities, as is allowed by this requirement of the Proposed Standard, does not provide a historic pattern for reliable insight because they would lack homogeneity and a comparable basis. This point is especially true for many litigation contingencies, where each case presents a unique fact pattern that cannot be used to draw correlations to other cases. It should be noted that disclosure of aggregated litigation amounts could make the non-aggregated information subject to discovery.

Additionally, we continue to be alarmed that the proposed requirement that the reporting entity disclose the amounts accrued will inevitably require disclosure of attorney-client communications and materials developed in anticipation of litigation (information protected by the work product doctrine). The ability to aggregate the enhanced disclosures required by the Proposed Standard is an illusory shield. Knowledge that the information has been aggregated also is knowledge that the information exists in its non-aggregated form. There is no apparent ability to shield the non-aggregated information, once it is developed for financial reporting purposes, from the reach of discovery and exploitation by the opposing party. This could result in the disclosure of information protected by the attorney-client privilege, likely resulting in a waiver of privilege and in the disclosure of materials protected by the work product doctrine.

Lastly, we note that the requirement to disclose settlement amounts sometimes would conflict with settlement agreements containing confidentiality provisions. Many times settlement agreements are made confidential to protect not only the parties involved, but also innocent third parties, for example to protect medical records. FASB should not intentionally impose accounting rules that would, in many cases, explicitly contradict court orders.

At a minimum, if the Board proceeds with this requirement, we request that the prejudicial exemption be returned as an option for preparers. We suggest that if aggregation is applied as outlined in the Proposed Standard and this does not sufficiently mask individual cases, then the entity have an option to apply a higher level of aggregation or omit the disclosures if higher levels of aggregation are not sufficient, for example if the entity has too few contingencies.

QUANTITATIVE DISCLOSURE

We are alarmed that the Board has added to this Exposure Draft the quantitative requirement to disclose “the amount accrued, if any.” We are very concerned with this addition for the same reasons we object to the tabular reconciliation outlined above. First, disclosure of this information will provide the plaintiff’s attorney with an advantage in settlement negotiations. For the reasons outlined above in the “Tabular Reconciliation” section, aggregation by class does not solve this problem. We believe that disclosing the amounts accrued could make it impossible to resolve the contingency for any amount less than the accrued amount as the plaintiff could use this amount as a floor for settlement negotiations. This could

convert "probable" contingencies to "certain". Second, this could result in the disclosure of information protected by the attorney-client privilege, likely resulting in a waiver of privilege and in the disclosure of materials protected by the work product doctrine. For these reasons, the existing Topic 450 requirement to only disclose this information if the financial statements would be misleading absent this disclosure is the superior reporting methodology.

In the Background Information and Basis for Conclusions, the Board expresses that financial statement users are concerned that disclosures currently typically do not include quantitative information. To address these concerns, the Proposed Standard requires the disclosure of publicly available quantitative information, for example, for litigation contingencies, the amount claimed by the plaintiff or the amount of damages indicated by the testimony of expert witnesses. We believe this information could be misleading to some investors and useless to the sophisticated investors who are aware that this information does not foreshadow the entity's ultimate losses.

As we noted in our comment letter for the last exposure draft, the amount the plaintiff demanded in a complaint bears no relationship to the reporting entity's ultimate loss. The amount claimed by the plaintiff, when a sum certain is claimed, is often grossly inflated and is not an accurate determinant of probable loss. For example, an independent study conducted by Cornerstone Research, *Securities Class Action Settlements—2007 Review and Analysis,* contains a chart of median settlements as a percentage of estimated damages by damage range (page 6 of the study). The chart shows that, based on a sample of 812 settlements during the period 1996 through 2006, the median settlement was 3.6% of the estimated damages and during 2007, the median settlement was 2.9% of the estimated damages based on a sample of 111 settlements. Similarly, various ACLI member companies have received complaints alleging millions of dollars of damages, only to have those cases settle for amounts far below any materiality threshold, and even below any nuisance value. It is easy to understand why there is a significant difference in estimated damages and settlements. From a plaintiff's perspective, a court would be unlikely to award damages beyond the extent to which the plaintiff believes it has been damaged. Consequently, it is in a plaintiff's interest to raise the amount of a claim.

Lengthy discovery processes, testimony provided under oath at trial, and considerations by both judges and juries as to the identification of pertinent evidence frequently produce results that bear no resemblance to allegations of liability and damage set forth in a complaint. Disclosure of this amount provides misleading information to potential and current investors because actual exposure is often dramatically less. Additionally, in practice, the plaintiff witnesses and the defendant witnesses will provide diametrically opposing damage amounts, which is also not meaningful to the financial statement user. In addition the amounts indicated by testimony are likely to be more confusing than useful, even if accompanied by a necessarily lengthy recitation of all of the assumptions upon which one or more "indications" were based. Moreover, since experts may present alternative and inconsistent opinions, reliance upon them as a basis for a quantitative disclosure would be misleading.

Lastly, the testimony of expert witnesses is not necessarily publicly available information because a deposition transcript may not be filed as part of the court docket and may be confidential if, for example, filed under seal. Even if an expert's opinion were publicly available, its availability (for example, at a hearing to determine the expert's fitness to testify) is likely to come long before a determination by a court of whether that expert's opinion is reliable. Accordingly, companies would be compelled to disclose damage figures that a court ultimately may find unreliable, leaving users of financial statements to sift through reams of motions and responses (and likely be required to conduct a fair amount of legal research) to determine whether the damages figure meets the minimal standard for admissibility.

QUALITATIVE DISCLOSURE

The quantitative disclosures only require that publicly available information be disclosed. We believe this principle should be added to the qualitative disclosure section as well. For example, in the early stages of

a contingency's life cycle, the Proposed Standard requires that entities disclose the basis for the claim and the basis for the entity's defense or a statement that the entity has not yet formulated its defense. To provide this information in the footnotes sooner than it is available to the plaintiffs would be prejudicial to companies and perhaps prohibited if settlement discussions are in process and the parties have agreed to confidentiality provisions.

Additionally, it is not clear in practice how a basis for defense could be provided when similar contingencies are aggregated, especially if cases are complex and have dissimilar bases for defense. Other than in the most simple case (litigation pleadings are rarely simple) a plaintiff's multiple contentions are typically of great length and the multiple bases of defense equally so. A brief summary of defenses may be incomplete, confusing and misleading. The low-frequency/high-risk event described in the sample disclosure is based on a flawed premise that also underlies many of the qualitative disclosure provisions: a presumption that litigation is an exception for modern corporations and not the rule. It is a presumption that has been, for good reasons, rejected in current corporate disclosure/examination requirements under both federal and state laws. Investors may need to be aware of high-risk litigation claims, as demonstrated by current legal requirements. However, reporting all litigation claims, regardless of risk, will obscure the importance of high-risk claims and diminish the impact of litigation risk management practices within a firm. Moreover, the reduction of complex legal analyses to the pattern set forth in the relatively simplistic sample disclosure may have the perverse effect of misleading investors. Furthermore, Securities and Exchange Commission (SEC) disclosure requirements currently govern litigation matters, and the requirements the Board determines necessary with respect to disclosure should be consistent and parallel with SEC standards.

The Proposed Standard requires that "in subsequent reporting periods, disclosure shall be more extensive, as additional information about a potential unfavorable outcome becomes available …" Potential litigation outcomes are highly variable and uncertain predictions that necessarily involve the disclosure of information protected by the attorney-client privilege, likely resulting in a waiver of privilege and in the disclosure of materials protected by the work product doctrine.

Lastly, the Proposed Standard also requires that other publicly available information be disclosed for contingencies that are considered *individually material* to allow financial statement users to obtain additional information. If this information is disclosed for a particular case in order to direct the reader to more detailed case information or otherwise, the financial statement user may then infer that the case is individually material. Today, many disclose this information for many cases, even if not individually material. For this reason, we suggest this disclosure requirement add, "This information may be disclosed for additional contingencies regardless of materiality if management so chooses."

EXPECTED INSURANCE RECOVERIES

Current Topic 450 language states, "[a]dequate disclosure shall be made of contingencies that might result in gains, but care shall be exercised to avoid misleading implications as to the likelihood of realization." The Proposed Standard requires the disclosure of "information about possible recoveries from insurance and other sources only if, and to the extent that, it has been provided to the plaintiffs(s) in a litigation contingency or it is discoverable by either the plaintiff or a regulatory agency." We continue to be concerned that the disclosure of expected insurance recoveries contradicts Topic 450's logical statement that "care shall be exercised to avoid misleading implications as to the likelihood of realization." To require disclosure of insurance recoveries may mislead investors into thinking the likelihood of realization is close to certain.

From a litigation perspective, insurance carriers typically will not move beyond a reservation of rights letter until the litigation is substantively resolved. Disclosing the amount would imply confirmation of coverage, which may not be the case. Additionally, disclosure of an expected recovery in cases where the reporting entity is denying liability creates a contradictory statement. This disclosure of an assessment of the

reporting entity's likely recovery will also disclose information protected by the attorney-client privilege and will require disclosure of materials prepared in anticipation of litigation (information protected by the work product doctrine). Such disclosure would provide confidential and highly prejudicial information to opposing counsel, who then can use the reporting entity's expected recovery as a floor in attempting to negotiate a litigation settlement. Providing this information would damage a reporting entity's ability to defend itself in litigation and may increase the entity's exposure, harming current investors and policyholders through increased premiums. Therefore, the superior solution is to retain the Topic 450 concept that these disclosures are optional.

The complexity of providing litigation disclosure takes on added significance for both the insurer and its policyholder. Although insurance claims liabilities are scoped out of the Proposed Standard, it should be noted that policyholders would still be required to disclose their contingencies and potential insurance recoveries in their financial statements. For many types of insurance coverage, an insurer has an obligation to defend its policyholder in litigation. Forcing policyholders to disclose material elements of pending litigation would compromise the insurer's ability to defend the policyholder and, ultimately, would raise the cost of the claim, while providing little or no incremental value to investors.

Lastly, we note that the requirement to disclose this information is potentially prejudicial. The Proposed Standard requires the information to be disclosed if it is discoverable. In practice, insurance arrangements are generally considered discoverable; however they are not usually requested by the plaintiff in the discovery process. Having to disclose this information solely because it is potentially discoverable, even if it has not been specifically requested by the plaintiff, would provide valuable information to the plaintiff's counsel, who can then use the company's expected recovery as a floor in attempting to negotiate a litigation settlement.

REMOTE CONTINGENCIES

The Proposed Standard requires loss contingencies within its scope to be disclosed, regardless of the likelihood of loss, if this information is necessary to inform users about the entity's vulnerability to a potential severe impact. This threshold significantly alters the current Topic 450 disclosure threshold and makes the filter for disclosure too permeable. We understand that the Board believes that to improve the timeliness of disclosures about loss contingencies disclosure of these remote contingencies is needed to inform users about the entity's vulnerability to a potential severe impact. As noted in the study highlighted above, based on a sample of 812 settlements during the period 1996 through 2006, the median settlement was 3.6% of the estimated damages and during 2007, the median settlement was 2.9% of the estimated damages based on a sample of 111 settlements. If the Proposed Standard had been in place during the time period of the cases in this study, many of the cases that eventually settled for low percentages of the estimated damages could have been disclosed as remote contingencies with possible severe impacts. As the study highlights, by the time of actual settlement, many of these contingencies did not have the severe impact that the damage amount would have indicated. This disclosure, had it been required during 1996 though 2007, could have resulted in misinforming users of the financial statements about the entities' vulnerability to potential severe impacts to the other extreme.

A reporting entity should be given discretion to avoid disclosure of remote lawsuits with speculative damages claims in order to prevent the reporting of misleading information in the financial statements. Disclosure of these types of items is not meaningful to the financial statement users – transparency does not require knowledge that a frivolous lawsuit exists. Such disclosure could be confusing to financial statement users and may present a distorted view of a reporting entity's liquidity, working capital, and financial position. It could also result in needlessly conservative investment decisions by potential investors because financial statement users would not be able to distinguish between those items that are likely to occur and those that are not likely to materialize. We believe this information could be misleading to some investors and useless to the sophisticated investors who are aware that this information is meaningless. With the worst case scenario of misleading investors and the best case scenario of

sophisticated investors dismissing the information as meaningless, the operational efforts that will be required to prepare this information do not justify the disclosure of remote contingencies. For these reasons, the Topic 450 disclosure threshold is more appropriate and, therefore, should be retained.

If the Board feels compelled to retain this disclosure requirement, we are concerned with the factors outlined in the Exposure Draft to guide the determination of when remote contingencies must be disclosed. The definition of severe emphasizes financially disruptive events; however, the factors listed in the Exposure Draft include non-financial considerations, for example, potential effect on operations and the amount of resources to resolve the contingency. Additionally, the cost of defense is irrelevant to whether or not a contingency may be financially severe. The company may choose to defend a claim out of principle or to set precedent, even if the actual claim lacks merit. We believe the definition of severe impact alone is sufficient and management can use this definition to guide their judgment regarding disclosure.

AGGREGATION CRITERIA

Within the Exposure Draft 450-20-55-1d, the Board has suggested if there are a large number of similar claims, an entity should consider disclosing the activity (for example, in a rollforward) of the following:

- Total number of claims outstanding
- Average amount claimed
- Average settlement amount

We are concerned that the average amount claimed and number of claims outstanding could be inflated by frivolous lawsuits and are irrelevant to actual risk of loss. Additionally, the disclosure of average settlement amounts that are immaterial could increase the volume of claims made against a company for similar reasons (i.e., copy-cat claims). We recommend eliminating this suggested rollforward.

SCOPE

It is unclear how guarantees within the scope of Topic 460, *Guarantees* (Topic 460) interact with the Proposed Standard. While they appear out of scope as the update only refers to Topic 450, we do note in the Amendments to Subtopic 460-10-50-5 that it makes reference to the fact that Topic 460 does not eliminate the requirement to disclose a contingent loss subject to the thresholds of paragraphs 450-20-50-1C through 50-1E. For example, we are unclear how guarantees that are within the thresholds of paragraphs 450-20-50-1C through 50-1E would then interact with the tabular reconciliation. All other contingencies within the tabular reconciliation are probable of occurring; Topic 460 requires the recognition of certain guarantees at fair value prior to these guarantees becoming probable. If both items are required in the tabular reconciliation, then the blending of probable contingencies and non-probable guarantees would be confusing to financial statement users.

EFFECTIVE DATE

For the reasons outlined in our comment letter, we urge the Board to not proceed with this Proposed Standard. If the board feels it necessary to proceed, we recommend the effective date be delayed until year-end 2011. The Proposed Standard would require significant data capture if it were to be issued as proposed. Additionally, new processes and policies will need to be developed to determine how entities will gather this data and set their thresholds for scope. This standard requires the education of non-accountants, namely the legal community, so that they can help make the accounting determinations required by the Proposed Standard. Sufficient time is needed to train and jointly develop policies for application. For example, entities have previously had no reason to set a formal policy as to what contingencies are remote and financially severe; these policies will need to be developed based on the joint discussions of accountants and legal experts. These decisions will require judgment which will take time to sufficiently document and vet with auditors. In addition to preparers needing to update their policies and procedures, the legal community and auditors have existing protocols for supporting the auditing process that will also require time to update and discuss to find the proper balance. For these

reasons we propose a delay of adoption until year-end 2011. While a full year extension may seem extreme, we also feel it is important to avoid implementing changes of this nature during an interim period.

CONCLUSION

Although intended to provide users of financial statements with information to assist in assessing the likelihood, timing, and amount of future cash flows, the Proposed Standard overreaches. It will cause the reporting entity to disclose confusing and potentially misleading information. Financial statement users will be inundated with information about certain "remote" contingencies causing them to have a skewed perception of a reporting entity's true exposure to loss. Furthermore, despite progress from the prior exposure draft, the Proposed Standard continues to contain requirements that require the disclosure of information that could be prejudicial to the reporting entity and could result in a waiver of attorney-client privilege.

We support the Board's commitment to provide financial statement users with transparent, timely, and useful financial information. However, for the reasons outlined above, we oppose the Proposed Standard and urge the Board to retain the current model of disclosure set forth in Topic 450 as the superior approach toward achieving the Board's expressed goals.

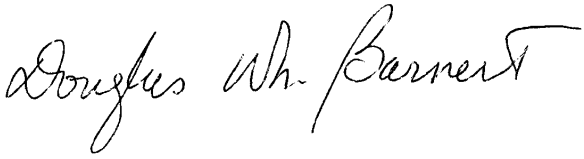
* * *

We appreciate the opportunity to provide the Board with comments during its redeliberations of the Proposed Standard. Please let us know if you have any questions or if we can provide additional information.

Respectfully,

Michael Monahan
Director, Accounting Policy
American Council of Life Insurers

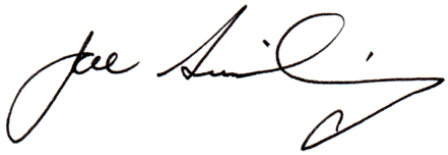
Phillip L. Carson
Assistant General Counsel
American Insurance Association



Douglas Wm. Barnert
Executive Director
Group of North American Insurance Enterprises

William Boyd
Financial Regulation Manager
Nationwide Association of Mutual Insurance Companies

James Olsen
Director, Insurance Accounting and Investment
Property Casualty Insurers Association of America



Joseph B. Sieverling
Senior Vice President and Director of Financial Services
Reinsurance Association of America