

# JPMORGAN CHASE & CO.

**Louis Rauchenberger**  
Managing Director & Corporate Controller

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  
Exposure Draft – Contingencies – Disclosure of Certain Loss Contingencies**

Dear Mr. Golden:

JPMorgan Chase & Co. (“JPMorgan Chase” or the “Firm”) appreciates the opportunity to comment on the Financial Accounting Standards Board’s (“FASB” or the “Board”) July 20, 2010, Exposure Draft of the Proposed Accounting Standards Update, *Contingencies - Disclosure of Certain Loss Contingencies* (the “ED”). The Firm not only prepares its own financial statements, but is also a significant user of other entities’ financial statements – through its lending relationships with thousands of corporate clients, and investment and asset management activities. Our comments reflect our views from both perspectives.

The Firm supports the Board’s efforts to provide investors and other users of financial statements adequate and timely disclosures that would assist them in assessing future cash flows associated with loss contingencies. We believe that the disclosure requirements under ASC 450 (formerly FASB Statement No. 5, *Accounting for Contingencies*) largely achieve those objectives and strike an appropriate balance between providing necessary information to investors while protecting from disclosure privileged and confidential information. To better identify and address any deficiencies in ASC 450 as it currently exists, we believe it would be useful for the Board to re-examine the original objective of this disclosure project and then re-assess whether a significant amendment to the existing disclosure requirements is necessary to achieve that objective. If the Board is concerned about diversity in practice regarding providing the information currently required, then perhaps issuing guidance that emphasizes the use of public information in disclosing the nature and type of loss contingencies consistent with existing best practices could be useful. For example, we believe that Item 103 of Securities and Exchange Commission (“SEC”) Regulation S-K provides useful disclosure guidance and should be considered by the Board for incorporation into ASC 450 for all entities, not just SEC registrants.

However, the Firm believes that the ED proposes to make more fundamental changes, which may result in the disclosure of confidential, privileged and sensitive information, (e.g. disclosure of

## JPMORGAN CHASE & CO.

certain quantitative information around litigation matters and certain non-income tax matters). Such information would be highly prejudicial to reporting entities and, in the case of ongoing litigation and negotiations with third parties, could negatively affect the outcome. While the Firm appreciates the Board's efforts to improve the disclosure requirements proposed in the June 2008 FASB Exposure Draft, *Disclosure of Certain Loss Contingencies* (the "2008 ED"), the Firm believes that concerns regarding confidential and privileged information have not been fully addressed in the current ED.

We discuss these matters in more detail below, and in our responses to the specific questions raised by the ED (see attached Appendix).

### *Prejudicial exemption and public information*

We are concerned that the ED does not provide an explicit exemption from disclosing information that is prejudicial to an entity. Although the ED attempts to compensate for the lack of a prejudicial exemption by proposing that entities may aggregate disclosures about similar contingencies (e.g., by class or type), we believe that such a solution does not achieve its objective.

The limits on aggregation that the ED suggests (i.e., it may not be appropriate to aggregate individual litigations with class actions, and may not be appropriate to aggregate items with different timing of cash flows) appear to suggest that the aggregation standards are narrow, and as a result litigation contingencies should be separated into several groups, thereby significantly increasing the risk of providing prejudicial information to opposing parties. Even aggregating the disclosure would not provide a meaningful shield of prejudicial information because either a single claim or a limited number of claims may account for a disproportionate amount of the total exposure. This is especially true for claims that arise from well-publicized matters. Accordingly, we believe that disclosures by class of litigation may result in revealing confidential, privileged and sensitive information that may be highly prejudicial and detrimental to any entity that is a defendant in a litigation matter.

In addition, certain of the information that the ED proposes for disclosure (for example, expert witness testimony) is often not publicly available (because courts have entered protective orders requiring information and documentation to remain shielded from public disclosure) or may be prejudicial itself. For example, a requirement for a defendant to disclose testimony from a plaintiff's expert witness could be contrary to the defendant's challenge of the status or authority of that expert witness.

The Firm believes that an express exemption from the disclosure of prejudicial information is required in the final standard to ensure that financial statement users obtain relevant information without compromising the ability of the issuer of the financial statements to protect confidential and privileged information. The Firm also believes that the final standard should express a principle for required disclosures, relying on publicly available information, without suggesting or requiring specific sources for such information, since the appropriate sources will often be dependent on the specific facts and circumstances of the particular contingency.

### *Attorney-client privilege*

The Firm believes that for most litigation-related matters, the claim amount may represent the upper end of the range of possible loss (that is losses that are "more than remote"). To narrow

## JPMORGAN CHASE & CO.

that range would require an entity to speculate about what plaintiffs might do, to assess novel claims or claims that are at preliminary stages of adjudication, or assess future actions or decisions that could be viewed as unlikely or unusual. Therefore, the Firm believes that disclosure of claim amounts is generally appropriate and can be made without waiver of attorney-client privileges.

Requiring an entity (i.e., a defendant in a legal matter) to disclose information contemplated by the ED may provide a plaintiff with information regarding the entity's litigation theory or strategy, thereby prejudicing it in the litigation. In addition, the disclosure of additional information, including management's estimate of probable losses, would seriously undermine the attorney-client privilege and attorney work product doctrine. (The attorney-client privilege protects communications by parties with counsel and certain other advisors. Similarly, the attorney work product doctrine shields materials prepared in litigation or in anticipation of litigation from discovery by opposing parties.) The ED contemplates disclosure of the kind of information that, at least for litigation-related matters, is typically protected by these privileges. That is because an assessment of a loss accrual is generally made in consultation with and upon advice of counsel. Compliance with the quantitative disclosure requirements in the ED could require entities to waive these privileges, allowing opposing parties to use this information against the disclosing entities in the litigation.

Finally, the amount of any accrual in a litigation matter will reflect the entity's judgment that a payment is probable, and will inevitably establish a "floor" for settlement negotiations. This will increase the cost of settlements for the entity to the detriment of its shareholders – an outcome that is clearly prejudicial.

### *Tabular reconciliation of recognized loss*

The Firm believes that the information provided in the tabular reconciliation of recognized loss contingences, as described in paragraph 450-20-50-1F(g), could be prejudicial to the reporting entity with respect to its pending litigation — particularly when a single claim or a limited number of claims account for a disproportionate amount of the total exposure.

For example, if a large and well-publicized lawsuit is filed against an entity during a reporting period and the tabular reconciliation reports a large increase in reserves during that same period, any financial statement user (including the plaintiff) may reasonably conclude that most, if not substantially all, of the increase is attributable to the new lawsuit. The Firm does not believe that this situation, or similar types of situations that lead to the same result, would be rare. Many entities that are subject to litigation would naturally have one or a small number of cases that are clearly more significant than all of the others, and we believe that such cases would often become transparent in a required rollforward – often regardless of the level of permitted aggregation.

This issue is compounded by the proposed requirement to disclose the reconciliation quarterly. Quarterly data may make even clearer to opposing parties the timing and amount of changes in an entity's estimated losses. The disclosure of such information, if it can be traced back to individual cases, raises the risk that courts could allow into evidence the fact that such an accrual has been made, thereby jeopardizing a defendant's request for summary dismissal of a particular lawsuit. Moreover, in instances where the ultimate resolution of a matter differs from prior estimates, the disclosures themselves could be used against the entity in an investor or shareholder lawsuit.

## JPMORGAN CHASE & CO.

We believe that the existing loss contingencies disclosures in ASC 450 strike an appropriate balance between providing necessary information to investors and protecting from disclosure privileged and confidential information. As such, we do not believe that the disclosure of accrual amounts or the tabular reconciliation is necessary in the final standard. The prejudice to the entity (including adversely affecting the outcome of litigation matters) of such disclosures far outweighs any informational benefit that would be provided to investors, who understand that all such accrued amounts would have been reflected in the entity's income statement; and therefore, the "probable and estimable" costs of the litigation, to date, had been fairly reflected in the entity's results of operations.

We would suggest therefore, that in lieu of the quarterly tabular reconciliation, the Board could consider requiring an annual disclosure of the aggregate liability recognized for loss contingencies, provided that such disclosure would not prejudice the entity's litigation position (i.e., as would be the situation if an entity only had one material litigation). An annual disclosure, so long as it is not prejudicial to the entity, would enable financial statement users to obtain an understanding of the effect of loss contingencies on an entity's financial condition. That information, in conjunction with an understanding of the nature and types of an entity's loss contingencies provided through footnote disclosures, would give financial statement users a useful understanding of loss contingencies while reducing the risk of providing confidential or privileged information to third parties.

### *Remote loss contingencies*

JPMorgan Chase does not support those provisions of the ED that relate to disclosures of certain remote loss contingencies that may have a potential "severe impact", i.e., an impact that is more than "material" but less than "catastrophic." Such a disclosure requirement would require entities to make predictions regarding matters that are, by their nature remote and therefore very uncertain. Factors such as the potential impact of the cost of defending, and the amount of management effort and resources required to resolve a particular matter would require predictions of future events that are speculative and outside of management's control. The judgments and predictions required of management, internal counsel, and external counsel to make such disclosures represents a novel set of issues that needs to be considered more thoroughly with attorneys and the American Bar Association.

The Firm believes that disclosure of such remote loss contingencies, particularly as it relates to litigation, would give credibility to cases that may be opportunistic and frivolous, and would be of dubious value to investors and users of financial statements. In addition, the Firm believes that disclosures of such cases that have a remote chance of success against an entity may lead to the filing of similar cases with speculative, meritless or highly inflated claims, which would require entities to expend additional resources in defending such cases.

We believe that requiring disclosure of information that is speculative and predictive in nature (for example, the proposed disclosure around certain remote loss contingencies), or that provides detailed preliminary assessments of litigation exposure, would not be meaningful to users and investors and would lead to the dissemination of information that is unreliable and potentially harmful to an entity. We believe that providing speculative disclosures regarding remote events would be inconsistent with the objective of providing financial statement users with meaningful and decision-useful information in a clear and concise manner.

## JPMORGAN CHASE & CO.

### Use of Information by financial statement users

The ED states that the reason that the Board has issued the proposed update is that “Investors and other users of financial reporting have expressed concerns that disclosures about loss contingencies under the existing guidance on contingencies in Topic 450 do not provide adequate and timely information to assist them in assessing the likelihood, timing, and magnitude of future cash outflows associated with loss contingencies.” In our experience as a user of financial statements, we have found that the disclosure requirements included in ASC 450 provide an adequate foundation for disclosures regarding the risks associated with loss contingencies. While we acknowledge that certain enhancements could be useful (for example, increasing consistency in practice regarding the level of disclosure), the Firm understands that disclosure of too detailed information by an entity would be adverse to the Firm’s interests as a lender or investor and that providing such prejudicial information represents a significant “cost” to the entity and its stakeholders. As such, we believe that the existing ASC 450 disclosure requirements achieve the appropriate balance: it ensures that information related to the loss contingencies is made available to investors, while information regarding strategies and management estimates that may adversely affect the entity’s interests in the resolution of contingencies are shielded from disclosure.

\* \* \* \* \*

We do not believe that an effective date of fiscal years beginning December 15, 2010 (for public companies) would leave preparers with adequate time to gather and evaluate the significant amount of additional information required by the ED. We encourage the Board to allow for the time necessary to thoughtfully address the concerns raised through public comments. The issuance of a final standard so close to the fiscal year-end for many companies would not provide adequate time for the consultations and process changes that the ED would require. Therefore, we propose that the effective date of the ED be delayed by at least one year for public entities if the Board does not agree with the Firm’s suggestion to significantly limit the ED’s scope and/or requirements.

If you have any questions or would like to discuss our comments further, then please do not hesitate to contact me at 212-270-3632 or Bret Dooley at 212-648-0404.

Sincerely yours,



Louis Rauchenberger

## JPMORGAN CHASE & CO.

### **APPENDIX: Detailed Comments on the ED**

#### **Question 1**

***Are the proposed disclosures operational? If not, please explain why.***

We believe that the Board will require at least a few months to redeliberate the issue raised in public comments, particularly those from the legal and audit professions. With the time required for redeliberation and then production of a final standard, we do not believe that implementation for periods ending after December 15, 2010 is operational.

After the issuance of a final standard (if the final standard is similar to the ED), preparers will be required to establish appropriate aggregation levels for loss contingencies and amend current processes to classify and monitor litigation and other matters within those classes. Such changes will require time and consultation with external counsel, and we do not believe would be operational within the timeframe specified in the ED.

#### **Question 2**

***Are the proposed disclosures auditable? If not, please explain why.***

The Firm believes that the requirements of the ED would need to be thoroughly discussed with the Public Company Accounting Oversight Board, the American Institute of Certified Accountants, and the American Bar Association (“ABA”) to address implications of the ED for the U.S auditing literature and the ABA’s Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests, particularly as it relates to these matters.

#### **Question 3**

***The June 2008 FASB Exposure Draft, Disclosure of Certain Loss Contingencies, had proposed certain disclosures based on management’s predictions about a contingency’s resolution. The amendments in this proposed Update would eliminate those disclosure requirements such as estimating when a loss contingency would be resolved and the entity’s maximum exposure to loss. Do you agree that an explicit exemption from disclosing information that is “prejudicial” to the reporting entity is not necessary because the amendments in this proposed Update would:***

- a. Not require any new disclosures based on management’s predictions about a contingency’s resolution***
- b. Generally focus on information that is publicly available***
- c. Relate to amounts already accrued in the financial statements***
- d. Permit information to be presented on an aggregated basis with other similar loss contingencies?***

***If not, please explain why.***

We believe that an explicit prejudicial example is necessary. The type and extent of information required to be disclosed should be considered in light of its potential significant detrimental effects to the entity and its investors and shareholders. Limiting the information provided to amounts accrued in the financial statements, and permitting

## JPMORGAN CHASE & CO.

some level of aggregation are still likely to reveal information that is prejudicial and detrimental to an entity that is a defendant in a claim. For example, disclosing an accrued amount for a particular litigation matter would often provide very useful information to opposing parties in assessing a starting point for settlement negotiations.

### **Question 4**

***Is the proposed effective date operational? If not, please explain why.***

We do not believe that the effective date for public entities is operational. Particularly, we believe that the requirements of the ED would require entities to seek a significant amount of additional input from in-house and external counsel, and establish processes, control procedures, and auditing procedures for the disclosed information, each of which may not be possible by the proposed effective date.

### **Question 5**

***Do you believe that the proposed disclosures will enhance and improve the information provided to financial statement users about the nature, potential magnitude, and potential timing (if known) of loss contingencies?***

We believe that the current disclosure requirements under ASC 450 provide an adequate foundation for disclosures that enable financial statement users to assess future cash flows associated with loss contingencies. In addition, we believe that the disclosures strike an appropriate balance between providing necessary information to investors and protecting reporting entities from disclosure of privileged and confidential information.

In terms of proposed disclosures that are incremental to those currently prescribed under ASC 450:

We believe that any perceived benefits of the tabular reconciliation are outweighed by the prejudicial effects of the proposed disclosure, particularly for litigation and certain non-income tax matters.

We do not support the disclosure of remote loss contingencies as we believe such disclosures are not meaningful and would be more likely to mislead than to inform investors. Specifically, with respect to litigation, the ED may require reporting entities to disclose information about frivolous disputes, which are reasonably believed not to prevail.

Instead, we believe that the Board should consider more modest enhancements to the existing disclosure requirements of ASC 450 to improve the consistency in the level of disclosures provided, without modifying the primary objectives of the disclosures required.

### **Question 6**

***Do you agree that nonpublic entities should be exempt from the tabular reconciliation disclosures required in the amendments in this proposed Update? If not, please explain why.***

## JPMORGAN CHASE & CO.

***Are there any other aspects of the amendments that should be applied differently to nonpublic entities? If so, please identify and explain why.***

We believe that the tabular reconciliation has limited benefit for all entities (public and non-public). Instead, we request that the Board consider an annual requirement to disclose the aggregate liability recognized for loss contingencies, provided that such disclosure is not prejudicial to an entity. In this regard, we believe that it is particularly important that the prejudicial exemption be maintained.

### **Question 7**

***The amendments in this proposed Update would defer the effective date for nonpublic entities for one year. Do you agree with the proposed deferral? If not, please explain why.***

We believe that the effective date of the ED for all entities (public and non-public) should be deferred for at least one year. This would allow preparers adequate time to gather and evaluate a significant amount of information.

### **Question 8**

***Do you believe that the proposed and existing XBRL elements are sufficient to meet the Securities and Exchange Commission's requirements to provide financial statement information in the XBRL interactive data format? If not, please explain why.***

We believe the proposed and existing XBRL elements relating to the ED provide a level of detail (i.e., dates, names, jurisdictions, laws affected, etc.) that is contrary to the goal of XBRL, which is to provide investors with information to facilitate comparability and analysis of companies' financial information. We believe the use of "block tags" provide sufficient information without the granular level of detail contained in many of the proposed XBRL elements. In addition, we believe the proposed XBRL elements would be unduly burdensome for preparers, does not appear to be required under SEC rules (which require disclosure of significant accounting policies and amounts contained in each footnote), and would not enhance the XBRL disclosures. Finally, it would be difficult to provide XBRL elements to disclose new contingencies or update existing disclosures for new developments during the tight reporting time frame.

In our review of the XBRL elements we noted the following:

- 1) There are a number of elements that are not specifically listed in the ED's disclosure requirements, e.g., (1) Loss Contingency, Management's Assessment and Process, (2) Loss Contingency, Opinion of Counsel; and
- 2) Codification References to 450-20-50-6 should be removed as this section is being superseded by 450-20-50-1C.