

September 15, 2010

Technical Director – File Reference No. 1840-100
Financial Accounting Standards Board
401 Merritt 7
Norwalk, CT 06856-5116

W. R. Grace & Co. hereby submits its comments on the FASB's Exposure Draft, *Proposed Accounting Standards Update*, Contingencies (Topic 450), Disclosure of Certain Loss Contingencies, File Reference No. 1840-100, issued July 20, 2010 (the "Proposed Update").

GRACE

Grace fully supports the pro market policy and objective of providing timely and accurate information to the investing public. For that reason, Grace prides itself on its strict adherence to the disclosure requirements of the United States securities laws, applicable state law disclosure requirements and corporate financial accounting standards. We appreciate this opportunity to participate in the evolution of the FASB's standards concerning disclosure requirements for loss contingencies. Of particular interest to Grace are the likely effects of the Proposed Update's disclosure requirements on a corporate entity's ability to maintain the confidentiality of legally protected information and to defend itself against unmeritorious or overreaching claims and lawsuits. Grace has amassed extensive litigation experience over the past few decades and believes it can make a significant contribution to the discourse concerning the ever-present tension between the extent of the corporate disclosures sought by the investing markets and the manner in which those disclosures are used -- and sometimes misused -- in the U.S. court systems.

Unfortunately, Grace's studied review of the Proposed Update did not reveal the hoped-for balance between the investor's need for relevant information and the disclosing entity's need to reduce risks and effectively fend off injurious lawsuits. As a whole, the Proposed Update would place companies in the untenable position of having to waive long-established legal protections against the disclosure of privileged and confidential information in order to comply with the Board's expanded disclosure requirements. Such waivers would not be inconsequential, technical relinquishments. Indeed, the information required to be disclosed regarding loss contingencies could be outcome-determinative and in some cases might result in losses to the companies in amounts exceeding their accruals, most of which are formulated on the basis of such protected information.

The Proposed Update's treatment of insurance coverage and recoveries would similarly act to undermine disclosing companies' efforts to minimize risks due to loss contingencies, while providing little in the way of clear and meaningful guidance to investors. One of the purposes and functions of financially sound risk management programs is to minimize such risks through the purchase of insurance coverage. Ignoring the protective effects of such coverage distorts the disclosing entity's risk position, thus misleading investors to their and the disclosing entity's detriment.

Grace's responses to certain of the questions posed in the Proposed Update are set forth in Appendix A to this letter. We urge the Board to seriously consider the concerns raised in Appendix A. We encourage the Board to test the reasonableness and legitimacy of our concerns by consulting with those who, like Grace, have extensive experience with the United States legal environment. We believe such discussions will convince the Board of the critical and fundamental roles played by such tenets as the attorney-client privilege and the attorney work product doctrine, and of the need to avoid introducing imbalance and uncertainty into well-functioning dispute resolution systems.

If you have any questions concerning any of Grace's responses, please contact Richard C. Finke, Assistant General Counsel-Litigation, W. R. Grace & Co. at richard.finke@grace.com or 410-531-4355.

Sincerely,

W. R. Grace & Co.

GRACE

**Appendix A – Response to Questions:
FASB Exposure Draft – *Proposed Accounting Standards Update,
Contingencies (Topic 450), Disclosure of Certain Loss Contingencies***

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.

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?

Summary Response

No, to all of the above questions. The amendments do require new disclosures based on management’s predictions about a contingency and its possible resolution. The amendments do not focus on information that is publicly available.

- the amendments repeatedly call for the use and disclosure of communications and information that are protected by law from disclosure outside the reporting entity.
- the required disclosures of confidential and protected information would in most cases be highly prejudicial to the entity, to the point of increasing the amount of the loss and actualizing a loss that, in the absence of the amendments’ requirements, would have remained a contingency subject to mitigation or avoidance.
- the amendments do not relate to amounts already accrued, but threaten to increase the dollar value of the disclosing entity’s existing loss contingencies and expose the disclosing entity to more future claims than would otherwise be asserted.
- the option to aggregate information is not likely to be available with respect to most loss contingencies due to the differentiating characteristics of most claims.
- even where available, the aggregation provisions in the amendments do not appear to be workable on a practical level.

- much of the information required to be disclosed will be confusing to financial statement users, may tend to distort a company's loss contingency position, and will not be susceptible to clear and concise elucidation.

Detailed comments in support of this summary response follow below.

Basis for the Exposure Draft Update

The Board's initial Exposure Draft in June 2008 sought to amend its existing guidance on disclosing loss contingencies for the stated reason that investors and other users of financial reporting expressed concerns that corporate disclosures about loss contingencies do not provide sufficiently adequate and timely information. Comments submitted in response to the June 2008 Exposure Draft asked the Board to support its stated reason. The Proposed Update fails to provide the requested justification for the proposed changes. It is neither sufficient nor defensible to baldly assert that investors' desires to reduce risk and uncertainty, or claimants' desires to gain a litigation advantage over a corporate adversary, is a sufficient rationale to require disclosing entities to surrender legally protected rights to their detriment. In light of the imbalance between the plaintiff-friendly disclosures required by the amendments and the serious financial harm that is very likely to be incurred by reporting companies that comply with the amendments, a compelling showing of need for the proposed changes is critical to garnering acceptance by the reporting business community.

Disclosure Principles

The Proposed Update sets forth two principles which entities "shall consider" in determining which loss contingencies are appropriate for disclosure (paragraph 450-20-50-1B). The first -- that more information about a loss contingency will be available later in its life cycle than in its early stages -- does not appear to be controversial. The second permits aggregation of disclosures about similar contingencies. Grace's extensive litigation experience over the past three decades indicates that jurisdictional and venue differences and other case-specific characteristics would, in most instances, make aggregation infeasible and thus of little utility.

Of far greater concern, however, is that from the perspective of the disclosing entities, there appear to be two other principles underlying the Board's disclosure requirements. First, running throughout the requirements is the principle that the Board gives virtually no weight or consideration to legally recognized protections from public disclosure that are afforded to privileged and other confidential information. In the Proposed Update, disclosing entities are required to surrender such rights and protections to investor desires to obtain privileged and confidential information where it relates to loss contingencies, even where the likely result of disclosure is to bring about the loss that was contingent and possibly could have been avoided in whole or in part but for the disclosure.

The second unstated principle is the presumption that "public" and "non-privileged" information is always relevant, informative and susceptible to simple elucidation. The amendments thus require disclosure of such information regardless of how flawed or misleading it may be to users of financial reporting. Where companies under the existing standard have the discretion to assess and evaluate the appropriateness of disclosing such information, the Proposed Update overrides that discretion and superimposes its unstated principle with respect to certain types of public information. We encourage the Board to re-examine its proposed amendments in light of the unstated presumptions that appear to have unduly influenced the Board's deliberations.

Impact on Confidentiality, Legal Protections and the Ability to Defend

Disclosure Threshold Determinations. By their terms and as a practical matter of compliance, the amendments require that management perform multi-faceted evaluations of future events and probabilities for the purpose of determining whether a loss contingency must be disclosed. This predictive process begins with the determinations that are required to be made under the amendments' disclosure thresholds (paragraphs 450-20-50-1C and 450-20-50-1D). Except in the rare case, those evaluations typically include investigation, research, analysis and input by a disclosing entity's legal counsel. Unless a claim has already been asserted, management and its counsel must attempt to predict whether it is probable that a claim will be asserted. In the typical situation where a claim has been asserted or is deemed probable, legal counsel will investigate all available probative facts and all relevant legal theories and defenses to assess the likelihood that the outcome of the loss contingency will or will not be unfavorable.

Assessment of remote loss contingencies, due to their very nature of being remote in terms of temporality and probability, require an even more uncertain level of prediction, as evidenced by the factors that a disclosing entity "should consider" in determining whether disclosure is required. Assessing

- the potential impact of the remote loss contingency on the entity's operations,
- the cost to the entity in defending its contentions, and
- the amount of effort and resources management may have to devote to resolve the contingency,

all entail evaluations of multiple future probabilities. Confidential business information, trade secrets and private employee data may be germane to such assessments. Legal counsel's work product will often be implicated in assessing possible courses of action and the cost of defense, including estimates of hard-to-predict litigation costs.

Should management determine from these evaluations that a contingency meets the disclosure threshold criteria, it often must justify its thinking to outside auditors with supporting facts and documentation. Under the prevailing case law in some jurisdictions, disclosure of attorney-client communications and attorney work product to outside auditors opens up the company to claims that it has waived the attorney-client privilege and the protections of the attorney work product doctrine, thus giving litigation adversaries a significant advantage to the detriment of the company. The amendments do not provide any recognition of the role played by privileged and confidential information in this process, and remove the only protection that the June 2008 Exposure Draft afforded to such information (see below).

Disclosure Requirements. Among the qualitative information the amendments require an entity to disclose are

- its estimated liability,
- the basis for the entity's defense or a statement that the entity has not yet formulated a defense, and
- the anticipated timing of (or the next steps in) the resolution of litigation contingencies

(paragraphs 450-20-50-1F(a)-(b)). This type of information nearly always incorporates legal counsel's assessment and analysis of applicable laws, judicial venues, jury pools, witness credibility, and numerous other relevant factors. The disclosure of the types of qualitative

information described above will thus entail the disclosure of attorney-client communications and attorney work product, all to the detriment of the disclosing entity.

Similarly, the amendments identify quantitative information that a disclosing entity “shall disclose,” such as estimations of the possible loss or range of loss, the amount accrued, or a statement that an estimate cannot be made “and the reason(s) why” (paragraphs 450-20-50-1F(e)). Such information is nearly always compiled by or with the assistance of legal counsel’s input, which in turn will consist of privileged communications, confidential information and work product. It follows that disclosure of such information may be highly prejudicial to a company’s litigation strategy and ability to defend itself. For example, if an adversary obtains such information through discovery, it will immediately establish a floor for any settlement amounts the company may have to pay. Once a claimant knows how much a corporate litigant expects to lose or is willing to pay in settlement, the claimant has no incentive to negotiate for any lesser amount. Thus, the disclosure required by the amendments will end up defeating the purpose for estimating the liability in the first place.

Need for Protective Provisions. The only protection from the severely prejudicial effects of the mandated disclosures that was contained in the June 2008 Exposure Draft -- the so-called prejudicial exemption -- has been deleted from the Proposed Update. Disclosing entities are thus left with the Hobson’s choice of providing claimant adversaries with severely prejudicial information or preserving the confidentiality of protected information and thereby failing to comply with the disclosure requirements. We encourage the Board to reconsider the lack of protection in the Proposed Update for protected information. The prejudicial exemption should be restored or, at the least, replaced by a proviso that a disclosing entity does not need to make a disclosure that would divulge, directly or in support of a disclosure, confidential business information, attorney-client communications or information protected from disclosure by the attorney work product doctrine or other legally recognized privileges.

Publicly Available Quantitative Information

The amendments’ disclosure requirements also mandate the disclosure of publicly available quantitative information such as the amount claimed by the plaintiff or the amount of damages indicated by the testimony of expert witnesses (paragraph 450-20-50-1F(e)(1) and (f)(1)). In the first instance, this disclosure is not necessary because the preceding provisions of the same paragraph require the reporting entity to provide detailed information about publicly available sources of publicly available information “such as court records,” including the court where proceedings are pending, the parties, the date instituted, etc. (paragraph 450-20-50-1F(c)).

More worrisome is the potentially misleading effect that may result from singling out such plaintiff-oriented allegations for mandated disclosure. Amounts claimed in pleadings are notoriously overstated and thus provide little if any guidance on the corporate defendant’s true liability exposure. Expert testimony is often slanted, may be based on flawed and inadmissible methodology, and/or may require extensive explanation, qualification, context and rebuttal to avoid being misleading. In addition, any explanatory exposition provided by the disclosing entity would likely have to be based on attorney work product that is legally protected from disclosure and may, if disclosed, relinquish an important defense advantage.

Another pitfall of relying on expert reports and pretrial expert deposition testimony is that the expert will not have been subjected to cross-examination. The investor thus will not have the opportunity to assess the expert’s credentials, credibility and methodology. Yet the disclosing entity is not given a choice in this matter, and its failure to fully explain and clarify the assertions of the plaintiff and its experts in the mandated disclosure could cause the entity to be subjected to allegations of violating federal securities laws. The Board should not place reporting entities in such a perilous position absent clear benefit to the investing public. Here, no one except the entity’s litigation adversary will benefit.

Insurance Recoveries

Contrary to the current standard, the amendments prohibit a reporting entity from considering the possibility of recoveries from insurance or any other indemnification arrangements when making a determination of a loss contingency's materiality (paragraph 450-20-50-1E). Yet the availability of insurance is not removed from the disclosure obligations. The same entity is required to disclose information about possible insurance and indemnification sources if it is "discoverable by either the plaintiff or a regulatory agency" (paragraph 450-20-50-1F(e)(5)). If the insurance company has denied, contested or reserved its rights relating to the entity's claim for coverage, those positions must also be disclosed. These requirements ignore the practical realities relating to insurance coverage, are likely to increase the reporting entity's exposure to claims, and will not enlighten investors' understanding of the entity's true liability exposure.

The ban on consideration of insurance and indemnification agreements will necessarily increase the number of loss contingencies that meet the disclosure threshold, thereby distorting the entity's liability exposure. The ban cannot be justified on the ground that such coverage is uncertain in all cases. Typically, the availability vel non of coverage is known to the corporate entity to a reasonable degree of certainty based on its reading of the policies, its prior relationship and course of conduct with its insurers, etc. More to the point, even where an insurer denies coverage or reserves rights (which in our experience is often done as a matter of course), the insured company is in the best position to assess the likelihood that insurance proceeds will be available to cover a given loss contingency and the amount of such proceeds, not the outside investor who has neither the specifics of a claim nor the applicable policies readily available to him. Thus the distorted loss contingency picture created by the prohibition against consideration of insurance recoveries will not be cured by the disclosure of an entity's insurance portfolio or its insurer's stated position with respect to coverage.

Regarding the provision requiring disclosure of possible insurance recoveries, the discoverability of such insurance is governed by state and federal procedural rules that have evolved after years of experience, debate, experimentation and jurisprudential analysis. The Proposed Update will have the effect of negating those systems by mandating disclosure prior to or possibly in lieu of the disclosure required by court rules. Nor is this negation brought about at no cost to the disclosing entity. Such public disclosure of insurance portfolios may invite copycat claims by potential litigation adversaries. The Board should withdraw the amendments relating to insurance and indemnification recoveries.

Tabular Reconciliation Requirements

The amendments retain the June 2008 Draft's requirement that a company provide in every annual and interim reporting period a tabular reconciliation of its accrued loss contingencies, including

- the amounts of accruals at the beginning and end of the period,
- the amount accrued during the period for new loss contingencies,
- increases and decreases of estimates for loss contingencies recognized in prior periods,
- decreases for settlements during the period, and
- a description of "the significant activity in these reconciliations"

(paragraph 450-20-50-1F(g)). Although Grace appreciates that this proposal attempts to elicit accrual data without requiring the disclosure of individual accruals, it nevertheless will prejudice the disclosing company by providing data that, together with other publicly available information about the company's pending litigation, will enable litigation adversaries to calculate or estimate the accrual for a given litigation. Of course, that information in an adversary's hands sets a floor for settlement discussions that will nearly always end in a loss to the company that exceeds the accrual.

At the very least, the proposed tabular reconciliation will become a target of discovery requests and motions submitted by plaintiffs, thereby placing the corporate defendant in the position of having to choose between litigating the propriety of the discovery requests with an uncertain outcome or settling the case to avoid disclosure, most likely at a premium. Grace was confronted with precisely that situation in a recent proceeding, in which a claimant's attorney tried every discovery device available to look behind a composite accrual that was established for a class of litigation, thus demonstrating the value plaintiffs' counsel place on such information. The potential prejudice to disclosing entities, the additional costs to those entities of capturing the required data and preparing the tabulations, and the minimal benefit to investors of such a tabulation argue against the proposal's adoption.