1840-100
Comment Letter No. 156

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VIA ELECTRONIC MAIL
director@fasb.org

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/Disclosure of Certain Loss Contingencies

Dear Mr. Golden:

Thank you for the opportunity to provide comments on the proposed accounting standards amendments applicable to the accounting for potential loss contingencies arising from litigation and withdrawal from a multiemployer defined benefit pension plan.

The Modular Installers Association is an association of office modular furniture installation contractors located in northern California. Our member companies employ on average over 300 carpenter employees who annually who perform in excess of 615,000 hours of work. Our members perform work important to clients looking for cost effective tenant improvement work in the development of office space.

As with any business operation, litigation confronts every one company. Our members are parties to collective bargaining agreements providing for retirement benefits from multiemployer defined benefit pension plans. As such, we are very concerned about the scope and nature of the proposed amendments pertaining to the accounting for loss contingencies. For the reasons stated below, the Modular Installers Association opposes the proposed changes to the current loss contingency standards pertaining to litigation and withdrawal from a multiemployer defined benefit pension plan. If any change is made to the reporting standard for withdrawal from a multiemployer defined benefit pension plan, it should be to amend the standard to apply only to a company that has decided and taken active steps to withdraw from such a plan.

Rationale for Proposed Amendments

The stated rationale for the proposed amendments is that investors and other users of financial reports have expressed concerns that existing guidance on loss contingencies does not provide adequate and timely information in assessing the likelihood, timing and magnitude of future cash outflows.[1] While these are legitimate concerns, the fundamental problem with the proposed amendments is that they do not adequately balance the stated concerns with the very legitimate concerns of the reporting company to: (1) protect its ability to vigorously defend itself against lawsuits without disclosing highly confidential attorney-client or litigation strategy information; and (2) protect its financial solvency, credit worthiness and bonding capacity (essentially its continued existence) by not accounting for the theoretically possible—but extremely unlikely—liability arising from withdrawal from a multiemployer defined benefit pension plan where the company has no intent to withdraw from the plan. Simply put, your proposed amendments will have the very likely effect of putting companies out of business by requiring them to account for highly unlikely charges against income in an effort to appease concerns of investors and other users of financial reports.

Disclosure of Certain Loss Contingencies Related to Litigation

Many of the comment letters already submitted to FASB point out the problems the proposed amendments applicable to litigation loss contingencies would create for companies defending themselves against meritorious and unmeritorious lawsuits. We agree with the arguments put forth by the U.S. Chamber of Commerce[2] and others and strongly support the position that these proposed amendments should be withdrawn leaving the disclosure guidelines as currently stated. The current standards preserve the balance between disclosure of certain potential losses arising from lawsuits and the effective use of legal counsel and defense strategies.

Disclosure of Loss Contingencies Related to Withdrawal Liability From a Multiemployer Defined Benefit Pension Plan

1. Are the proposed disclosures operational? No.

A. The proposed disclosure requirements would delay completion of year-end financial reports.

Under the proposed amendment, the administrators and actuaries of each multiemployer defined benefit pension plan ("Plan(s)") would be required to calculate each year the proportionate share of withdrawal liability for each contributing employer

[1] FASB Exposure Draft, Contingencies (Topic 450), July 20, 2010, p.1.
[2] U.S. Chamber of Commerce August 11, 2010, Comment Letter re: File Reference No. 1840-100.

regardless of the employer's intention to withdraw from the Plan. In many Plans, there are hundreds of contributing employers. In addition, many employers contribute to multiple Plans on behalf of their employees working under different collective bargaining agreements. For each Plan, the work necessary to provide the information required by the proposed changes would take significant time and resources. This is especially true now since many plan administrators have reduced staffing in an effort to cut payroll and other operational expenses in order to improve the financial condition of the Plans. Most plan administrations and actuaries are set up to handle the tasks required to address the handful of withdrawing employers each year—not the work required to handle the research and calculations for the hundreds of contributing employers. Accordingly, the substantial time required to research, calculate and deliver the withdrawal liability information to each of the hundreds of contributing employers would very likely cause a delay in the completion of the contributing employer's year-end financial reports. The delay caused by such an operational burden does not serve either the best interests of the reporting company or the users of the year-end financial reports.

B. The proposed amendments would result in untimely and inaccurate information.

Many Plans and their contributing employers do not share the same fiscal year end. A significant number of Plans in the construction industry have plan years that end on dates other than December 31 (usually June 30) in order to align with the expiration date or date of annual contribution rate changes contained within the collective bargaining agreement giving rise to the Plans and obligation to contribute. The funding status of a Plan is calculated by Plan actuaries only at the end of each Plan fiscal year. As such, this information is "stale" almost as soon as it is calculated because the funding status and the amount of any surplus or deficit changes with the value of Plan assets, number of Plan participants, changes in interest rates and the amount of contributions by participating employers. In the case of a Plan with a fiscal year end of June 30 and a contributing employer with a fiscal year end of December 31, the withdrawal liability figure for such an employer is not truly accurate due to the changes in interest rates, value of Plan assets and amount of contributions during the six months between the Plan fiscal year end and the employer's fiscal year end. This operational challenge alone defeats the rationale to provide more timely and accurate information to uses of financial reports.

C. The proposed amendments would result in increased costs without any meaningful benefit to users of financial reports.

In addition to the practical challenges, the proposed amendments fail any operational cost-benefit analysis. Requiring each contributing employer to obtain from each Plan its proportionate share of withdrawal liability would impose a substantial annual financial burden on the Plans or the contributing employers if the cost of providing such information was shifted from the plan to each employer. Plans or contributing employers would incur additional expenses arising from the increased work necessary to determine each contributing employer's proportionate share of liability—an

activity not currently performed. As noted above, the implementation of the proposed amendment would likely result in delayed completion of year-end financial reports and the information would likely be inaccurate due to the timing inconsistencies. Essentially, the proposed amendment would increase costs to the Plan or contributing employers and users of financial reports would receive no timely or accurate information.

2. Will the proposed disclosures enhance and improve the information provided to financial statement users about the nature, potential magnitude and potential timing of loss contingencies related to withdrawal liability from multiemployer defined benefit plans? No.

The Multiemployer Pension Plan Amendment Act modified the Employee Retirement Income Security Act in 1980 to create withdrawal liability.[3] Under the modified Act, a construction industry employer participant in a multiemployer defined benefit pension plan will incur withdrawal liability if it ceases to have an obligation to make contributions to that plan and remains in business performing the same activities in the same geographic area covered by the collective bargaining agreement providing for contributions to the plan.[4] If a contributing employer is not withdrawing from the plan, then that employer has no withdrawal liability. As such, any withdrawal liability to a non-withdrawing employer is not a contingent liability because the probability of incurring the expense is zero. Unlike the other circumstances of contingent losses provided for in Topic 450, withdrawal from a Plan and incurring liability for unfunded vested benefits is solely within the control of the contributing employer.

Under the proposed amendment, all contributing employers to a multiemployer defined benefit pension plan would be required to obtain the amount of their withdrawal liability to an under-funded Plan each year and report it as a charge against income.[5] Certainly, if a contributing employer decides to withdraw from a multi-employer defined benefit plan, then the liability ceases to be purely theoretical and becomes an actual liability that should be reported on the company's financial reports. However, to require a non-withdrawing employer to report its proportionate share of unfunded liability when there is no legal basis upon which to impose such liability would do irreparable harm to all non-withdrawing companies. A significant charge against the income of a non-withdrawing company— income which is already lower due to the recession—will very likely affect the covenants on existing loans, the credit worthiness of the company and its continued bonding capability. In addition, requiring a non-withdrawing company to report such a charge against income would decrease the valuation of the company in a succession plan or business sale situation—even though there is no legal obligation compelling the company to pay any withdrawal liability.

[3] ERISA Section 4201, 29 U.S.C. Section 1381.
[4] ERISA Section 4203(a), 29 U.S.C. Section 1383(a).
[5] Paragraph 715-80-50-2 of the Proposal.

While many multiemployer defined benefit pension plans are recovering from the decreased value of plan assets arising from the collapse of the financial markets in 2008, the recovery of the plans has been slowed by the recession and high unemployment, particularly in the construction industry. As a result, many plans are currently in an under-funded position and will likely be so for the next several years. Implementing the proposed amendments which require contributing employers to take a charge against income without distinguishing between withdrawing and non-withdrawing employers to such plans will unnecessarily cause significant adverse economic impacts to non-withdrawing employers struggling in an already difficult environment.

In our opinion, neither of the stated objectives of the proposed amendment can or will be accomplished by the proposed amendments. Accordingly, we strongly urge you to withdraw the proposed amendments to the litigation loss contingency and multiemployer defined benefit plan withdrawal liability standards.

Sincerely,

Michael J. Vlaming
Executive Director

Cc. Modular Installers Association Members