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September 20, 2010

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

Via email to [director@fasb.org](mailto:director@fasb.org)

**Subject: File Reference No. 1840-100 –Proposed Accounting Standards Update:  
Disclosure of Certain Loss Contingencies**

Dear Mr. Golden:

On behalf of the National Association of Manufacturers (NAM), I am pleased to submit the following comments to the Financial Accounting Standard Board (FASB) July 20, 2010, exposure draft on Disclosure of Certain Loss Contingencies (the Exposure Draft).

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers and to improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth, and to increase understanding among policymakers, the media and the public about the importance of manufacturing to America's economic strength.

Manufacturers support FASB's efforts to improve financial reporting. In August 2008, the NAM submitted comments expressing our concerns with the June 5, 2008, exposure draft of a proposed Statement of Financial Accounting Standards, *Disclosure of Certain Loss Contingencies*. While we appreciate that some of these concerns have been addressed in the current Exposure Draft, NAM members continue to believe that the proposed changes to rules on disclosing loss contingencies, if finalized, would have a negative impact on companies and would not improve the quality of financial reporting.

Consequently, NAM urges the FASB not to proceed with its proposed disclosure standard relating to loss contingencies. We are concerned that the proposed standard would lead to misleading and less useful information for investors, threaten the attorney-client privilege and the attorney work product doctrine and unnecessarily expose companies to additional litigation risk. The current ASC 450 and ASC 274 disclosure requirements work well and manufacturers generally do not see the urgency to change them.

Nonetheless, we recognize that FASB has devoted significant time and resources to this project. Consequently, if the project does move forward, at a minimum, we strongly urge you to consider the following issues:

### **Disclosure of Accrual Amounts**

NAM members support the current standard for disclosing accruals that requires companies to disclose only the individual amount accrued for a probable loss contingency "if necessary for the financial statements not to be misleading." In contrast, we have significant concerns that the proposal in the Exposure Draft that requires disclosure of accruals for a probable loss contingency would have a negative impact on a company's litigation strategy and possibly fuel additional litigation. This proposed disclosure of accruals goes far beyond the current requirement.

In particular, disclosed accruals by contingency class could be used to establish a floor for negotiation and settlement purposes and potentially could be used by plaintiffs during a jury trial to create the perception of perceived damages. In addition, the required inclusion of the tabular reconciliation of accrued loss contingencies for public companies would highlight changes in management perceptions about the case and provide an advantage for plaintiffs.

*Prejudicial Exemption:* Manufacturers strongly support the inclusion of an explicit exemption from disclosing information that is "prejudicial" to the reporting entity. While the FASB believes there is no need for an exemption because the disclosure rules only apply to "public" information, accruals by their very nature involve the use of significant judgment, are not public information and would be prejudicial if disclosed in a manner that a reader can attribute to a particular type, class or jurisdiction of litigation.

*Aggregation:* The NAM disagrees with FASB's position that aggregation would eliminate the prejudicial concern on accruals. Although the exposure draft would allow companies to aggregate disclosures about similar contingencies, the aggregation concept would not necessarily address the problems raised by the accrual requirements.

Aggregation is designed to provide information about a company's loss contingencies without overloading the financial statement user with excessive detail. However, by requiring aggregation based on type of lawsuit, legal characteristics, jurisdiction and timing of settlement, the proposed guidelines for determining the aggregation level would lead a preparer toward a lower level of aggregation

Moreover, many of our smaller members do not have sufficient loss contingencies related to litigation that aggregation would avoid the disclosure of prejudicial information inherent in their accruals.

In addition, the usefulness of certain aggregated information is questionable (e.g., the range of loss, estimated timing, etc). An aggregation of the top end of a range of potential losses could lead to the mistaken conclusion that a company would suffer that magnitude of a

loss, while it would be extremely unlikely for a company to incur the maximum loss for every case.

### **Attorney-Client Privilege and Work Product Doctrine**

Manufacturers are concerned that the disclosure of accrual amounts discussed above could jeopardize the attorney-client privilege and the work-product protection doctrine. While the Exposure Draft does not include proposals in the earlier draft that would require companies to provide speculative and predictive disclosures, we believe that the requirements in the current Exposure Draft could raise the risk of waiver of the attorney-client privilege and the work product doctrine.

In particular, the required disclosures necessarily would require input from in-house and/or outside counsel. Those disclosures could constitute public disclosure, and therefore a waiver, of the attorney-client privilege and/or the work product doctrine. Apart from the disclosures themselves, independent audits, which would likely include underlying communications with counsel, may constitute a waiver of the privilege and/or protection doctrine.

### **Insurance Disclosure**

The NAM also has serious concerns about the required disclosure of potential insurance or other indemnification arrangements, which would provide non-public information to both current and potential plaintiffs. In particular, information about insurance held by a company could encourage plaintiffs to file frivolous or “copy cat” suits in hopes of an entity being more willing to settle a covered claim.

In addition, required disclosure of insurance could be prejudicial to the company even though the information is “discoverable.” Currently courts—not the parties to the litigation—make the determination of whether information is “discoverable.” By forcing a company to determine what information is discoverable, the Exposure Draft would interfere with the role of the court and could unfairly influence the litigation. Manufacturers strongly recommend that, if the Exposure Draft moves forward, that this requirement be dropped from the final guidance.

### **Effective Date**

NAM members also believe that the proposed effective December 31, 2010, effective date for the new guidance—roughly three months from the September 20<sup>th</sup> deadline for comments—is neither practical nor operational. In particular, implementing the proposed changes for this year's 10K reporting will be a significant issue since companies will have to develop processes for gathering auditable information for the proposed disclosures. We strongly urge you—at a minimum—to delay the effective dates so that the new rules would apply to annual financial statements issued by public companies for fiscal years ending after December 15, 2011, and, for nonpublic companies, would apply for the first annual period beginning after December 15, 2010.

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**Conclusion**

In sum, manufacturers believe that any benefits of the current Exposure Draft are far outweighed by the potential negative impact of the proposal on U.S. manufacturers and their shareholders. We strongly urge you to withdraw the proposal, or, at a minimum, address the issues in the current Exposure Draft as outlined above. Thank you in advance for considering our comments.

Very truly yours,

A handwritten signature in black ink that reads "Dorothy Coleman". The signature is written in a cursive style with a large, looped initial "D".