



Project **Liabilities—Amendments to IAS 37**

Topic **Applying the proposed requirements to litigation liabilities**

Overview of paper

1. At various times, some constituents and Board members have expressed concerns that defendants in some legal proceedings might encounter practical problems when applying aspects of the proposed amendments to IAS 37 *Provisions, Contingent Liabilities and Contingent Assets*.
2. On each occasion, the Board has decided to consider these concerns further, but too wait until it was closer to finalising the proposed amendments before doing so. It is now at that stage.
3. This paper gathers all the concerns and considers what, if anything, the Board needs to do to overcome the problems.
 - *Section 1* (paragraphs 4-15) summarises the current proposals for recognition, measurement and disclosure of liabilities, insofar as they apply to defendants in legal proceedings

This paper has been prepared by the technical staff of the IASCF for discussion at a public meeting of the IASB.

The views expressed in this paper are those of the staff preparing the paper. They do not purport to represent the views of any individual members of the IASB.

Comments made in relation to the application of an IFRS do not purport to be acceptable or unacceptable application of that IFRS—only the IFRIC or the IASB can make such a determination.

The tentative decisions made by the IASB at its public meetings are reported in IASB *Update*. Official pronouncements of the IASB, including Discussion Papers, Exposure Drafts, IFRSs and Interpretations are published only after it has completed its full due process, including appropriate public consultation and formal voting procedures.

IASB Staff paper

- *Section 2* (paragraphs 16-34) considers whether the proposed amendments would cause practical problems for entities that already apply IFRSs. The staff recommend that:
 - (i) the Board does not change the proposed recognition and measurement requirements for litigation liabilities;
 - (ii) the revised standard should continue to describe the circumstances in which liabilities cannot be measured reliably as ‘extremely rare’; and
 - (iii) no further guidance is needed on the circumstances in which a liability cannot be measured reliably.

- *Section 3* (paragraphs 35-59) considers practical problems that entities might have applying the IAS 37 recognition and measurement requirements to litigation liabilities in the US. For US entities, the perceived problems would not be caused solely by the proposed changes to IAS 37. Rather they would arise from existing differences between IAS 37 and US GAAP requirements. The staff do not make any recommendations on this matter. Instead we ask for direction from the Board on how to proceed.

SECTION 1 Summary of proposed requirements

4. This section summarises the current proposals for recognition, measurement and disclosure of liabilities by defendants in legal proceedings. *All decisions reported in this section are the most recent tentative decisions.*

Identification of liabilities

5. The Board has decided that the revised standard, like the existing IAS 37, should acknowledge that there will be circumstances in which it is unclear whether the entity has a present obligation. Such circumstances could include those in which the entity:
- (a) disputes a claim that alleged events have occurred, or
 - (b) acknowledges that the events have occurred but disputes that they give rise to a present obligation.
6. The Board has decided that, in such circumstances, an entity should consider all available evidence and reach a judgement about whether it has a present obligation. The relevant evidence depends on the individual facts and circumstances of each case, but it could include:
- (a) the entity's own (or other entities') past experience of similar items
 - (b) claims made against the entity
 - (c) opinions of experts
 - (d) information provided by events occurring after the reporting period about circumstances existing at the end of the reporting period.¹

Only if management judges that the entity has a present obligation should it conclude that it has a liability and so apply the recognition criteria.

¹ IASB meeting July 2007

7. These proposals are similar to the existing requirements of IAS 37. The only difference is the removal of an explicit probability threshold²: at present IAS 37 states that the entity should conclude that a liability exists if it judges that *'it is more likely than not that'* it has a present obligation.

Recognition

8. At present, IAS 37 contains two recognition criteria. An entity recognises a liability that it concludes exists only if:
- (a) it is probable that an outflow of resources embodying economic benefits will be required to settle the present obligation; and
 - (b) a reliable estimate can be made of the amount of the obligation.
9. The Board has decided to remove criterion (a), the 'probability recognition criterion'.³ Thus the revised standard would require entities to recognise all liabilities that they can measure reliably.
10. Like the existing standard, the revised standard will note that the use of estimates is an essential part of the preparation of financial statements and does not itself undermine the reliability of the statements. Except in 'extremely rare cases', an entity will be able to identify a range of possible outcomes and therefore determine a reliable measure of the liability.⁴

² IASB meeting, October 2007

³ IASB meeting, February 2008

⁴ Exposure Draft of Proposed Amendments to IAS 37 *Provisions, Contingent Liabilities and Contingent Assets*, June 2005 (the Exposure Draft), paragraph 27.

Measurement

11. The Board has decided that entities should measure liabilities at the amount they would rationally pay at the end of the reporting period to be relieved of the present obligation, ie to settle it or to transfer it to a third party.⁵ This amount can be estimated using an expected cash flow approach. Such an approach takes into account all possible outcomes, weighted by their associated probabilities.

12. Draft measurement guidance discussed at the Board meeting in April 2009 proposes to clarify that, if the obligation is of a type that is fulfilled by making payments to the counterparty—as will be the case with most legal disputes—the relevant cash flows include:
 - (a) the amounts that are expected to be paid to the counterparty; and
 - (b) associated costs, such as legal fees.

13. The proposals may change the way in which entities measure single obligations, such as those associated with one-off legal proceedings. At present, some entities measure single obligations at their most likely outcome, not the weighted average of all possible outcomes.

Disclosure

14. The Board does not propose any significant changes to the IAS 37 disclosure requirements. The revised standard would require entities to disclose the following information:

⁵ IASB meeting, December 2007

- (a) for each class of recognised liability:
 - (i) the nature of the obligation
 - (ii) the carrying amounts at the start and end of the reporting period and the items reconciling the two amounts
 - (iii) the expected timing of any outflows of economic benefits
 - (iv) the uncertainties about the amount and timing of those outflows, and
 - (v) the amount of any right to reimbursement, stating the amount of any asset recognised for that right.⁶

- (b) for any liability that is not recognised because it cannot be measured reliably:
 - (i) the nature of the obligation and the reasons why it cannot be measured reliably
 - (ii) the uncertainties relating to the amount and timing of any outflow of economic benefits, and
 - (iii) the existence of any right to reimbursement.⁷

- (c) for any situation described in paragraph 5 above in which the entity has judged, on the basis of the available evidence, that it does *not* have a present obligation, but there is more than a remote possibility of an outflow of economic benefits:
 - (i) a description of the circumstances
 - (ii) an estimate of the financial effect
 - (iii) an indication of uncertainties relating to the amount or timing of any outflow of economic benefits, and
 - (iv) the possibility of any reimbursement.⁸

⁶ Exposure Draft, paragraph 68.

⁷ Exposure Draft, paragraph 69.

⁸ Wording proposed in Paper 4C for this meeting.

15. The Board proposes to retain the ‘prejudicial information’ exception in the existing IAS 37. An entity is not required to disclose the information specified in paragraph 14 in the ‘extremely rare’ circumstances that disclosure would prejudice seriously the entity’s position in a dispute with other parties. The entity is instead required to explain the general nature of the dispute together with the fact that, and reasons why, the information has not been disclosed.⁹

SECTION 2 Practical problems for entities that already apply IFRSs

16. This section considers possible problems faced by entities that already apply IFRSs. For such entities, the problems would arise from the proposed changes to IAS 37.

Summary of concerns

17. The possible problems that constituents have identified fall into two groups:
- (a) the proposed requirements for identifying, recognising and measuring liabilities increase the risk that recognition of a litigation liability will in itself prejudice the outcome of the proceedings. (Paragraphs 18-25.)
 - (b) the outcomes of major one-off legal proceedings can be very difficult to predict. The Board should acknowledge that the circumstances in which such liabilities are incapable of reliable measurement will not be ‘extremely rare’. And it should give more guidance explaining the circumstances in which the reliable measurement criterion will not be satisfied. (Paragraphs 26-34.)

⁹ Exposure Draft, paragraph 71.

Recognition will prejudice the outcome of the proceedings

The concerns expressed

18. Constituents have argued that the proposed new requirements for recognising and measuring litigation liabilities could prejudice the outcome of the proceedings:
- (a) *regarding recognition*: the removal of the probability recognition criterion means that defendants in legal proceedings will need to recognise a liability even if the most likely outcome is that the court will find in their favour. The recognition of a liability in such circumstances could alter the outcome of the proceedings. It will be seen as an admission of culpability and the expected value at which the liability is recognised will be treated by a court as the starting amount of damages to be awarded to the plaintiff.
 - (b) *regarding measurement*: communications between a defendant and its lawyers could lose their lawyer-client privilege if revealed to auditors. Adversaries could seek ‘discovery’ of these opinions, and use them against the defendant in court. Discovery of the opinions required to support an expected value calculation would be more damaging than discovery of the opinions that lawyers currently provide to auditors.
19. Some of those who have these concerns also note that the outcomes of major one-off legal proceedings are unpredictable. Therefore, they argue that the most useful information is contained in the disclosures of the facts and uncertainties surrounding the legal proceedings, not the amount that is recognised as a liability. In their view, little useful information would be lost if the liabilities were not recognised at expected values, if sufficient information were disclosed in the notes to the accounts. Some suggest that no liability should be recognised. Others suggest that the liabilities should be recognised but measured at the minimum (or possibly maximum) amount in the range of reasonably possible outcomes.

Possible counterarguments

20. It could be argued that the concerns expressed in paragraph 18 are overstated—the proposed changes to the recognition and measurement requirements are unlikely to cause significant new problems:
- (a) the concern about more liabilities being recognised arose initially in response to the Exposure Draft proposals. In the Exposure Draft, the Board included an example of a disputed lawsuit. It concluded that the start of the legal proceedings gave rise to a liability to stand ready to perform as the court directed.¹⁰ Applying this conclusion, entities would need to recognise liabilities even if they thought that it was unlikely that they would be found liable. However, the Board has since changed its mind. It has concluded that the start of legal proceedings is not the event that gives rise to an obligation, though it might be one indication that the entity has an obligation.¹¹ Rather the entity has an obligation only if has committed an act of wrongdoing. In situations of uncertainty, management must reach a judgement based on available evidence. The criteria that the Board now proposes for identifying a liability are very similar to the existing criteria in IAS 37. Thus, at least part of the reason for the concerns expressed by respondents to the Exposure Draft no longer exists.
 - (b) the removal of the probability recognition criterion should have little impact in practice for defendants in legal proceedings:

¹⁰ Example 1 of Illustrative Examples in the Exposure Draft.

¹¹ IASB meeting, June 2006.

- (i) suppose, on one hand, that an entity judges that, on the basis of the available evidence, the entity does *not* have a present obligation. It does not recognise a liability, whatever the recognition criteria are.
- (ii) suppose, on the other hand, that an entity concludes that it has done something wrong and has a present obligation. Given that the wrongdoing has been detected, it is unlikely that the entity could reach a conclusion that it is *probable* that there will be *no* outflow of economic benefits (ie no compensation payable at all). In other words, whether or not the standard includes a probability recognition criterion, the entity needs to recognise a liability for some amount.

Thus, it could be argued that defendants will not necessarily recognise more liabilities applying the revised standard than they recognise at present applying IAS 37.

- (c) it could also be argued that, although loss of lawyer-client privilege is a risk:
 - (i) in jurisdictions other than the US (discussed in the next section) is more usually a theoretical risk than a problem that actually arises in practice.
 - (ii) auditors might have other means of obtaining the information they need without asking for detailed opinions from lawyers.
 - (iii) discovery of opinions needed to support an expected value measurement would not be significantly more damaging than discovery of opinions needed to support existing liability measurements. Arguably, information about the most likely outcome is likely to be as damaging as additional information about other possible outcomes.

- (iv) in most instances, claims will be routine in nature and the amounts recognised and measured will be aggregated amounts. Information provided by lawyers could be provided in aggregate for different types of legal proceedings, not necessarily on a case by case basis.

21. It could also be argued that disclosures are not an adequate substitute for recognition. Some users have told us that they *have to* try to quantify litigation liabilities. If there is no amount recognised in the financial statements, the users have to make their own estimates. They think that the management of an entity is better-placed to estimate the liability than they are.

Staff analysis

22. On the basis of the arguments in paragraphs 20 and 21, the staff conclude that:
- (a) the proposed amendments to the recognition and measurement requirements do not significantly increase the risk of prejudicial information being disclosed; and
 - (b) some useful information would be lost if liabilities were instead either not recognised at all, or recognised at a less relevant amount, such as the minimum or maximum amount in the range of reasonably possible outcomes.
23. Therefore, the staff recommend that the Board should not make any exceptions to the proposed recognition and measurement requirements for litigation liabilities.

24. If the Board disagrees, it will need to consider the scope of the exception. It could be argued that the scope should encompass only situations in which the risks of prejudicial information being disclosed outweigh the benefits to users of liabilities being measured at a relevant amount. This might be the case if the entity is facing major unprecedented legal proceedings. In such situations, the liability might not be capable of being aggregated with others in the same class and the outcomes might be least predictable. The Board could restrict the ‘recognition exception’ to situations in which the liability could not be recognised and disclosed within a class of similar items.
25. The Board would also have to consider whether to require additional disclosures by defendants that take advantage of the exception, and if so, what additional information should be disclosed.

Questions for the Board

- 1 The staff recommend that the Board should not make any exceptions to the proposed recognition and measurement requirements for litigation liabilities. Do you agree?
- 2 If you do not agree:
 - (a) in which circumstances do you think that the exception should apply?
 - (b) do you think entities availing themselves of the exception should be required to disclose any additional information about the legal proceedings?

One-off litigation liabilities not capable of reliable measurement

Constituent concerns

26. The second concern for existing IFRS users is that the outcomes of major one-off legal proceedings can be very difficult to predict. The range of possible outcomes can be vast. Hence, the liabilities cannot be measured reliably.
27. Some constituents argued that expected values are even more difficult to measure reliably than the most likely outcomes. With limited experience of similar claims, entities and their legal advisers will be unable to assign reliable probabilities to different outcomes. The cash outflows associated with less probable outcomes are particularly difficult to predict—the improbability of the outcomes means that there are fewer precedents on which to draw.
28. These constituents suggest that the Board should acknowledge this fact and reconsider the statement that the circumstances in which liabilities are incapable of reliable measurement will be ‘extremely rare’. The word ‘extremely’ stops entities using the exception, even when a liability cannot be measured reliably. Major legal proceedings are no longer extremely rare. If the Board removed the word ‘extremely’, it would achieve the right balance between use and overuse.
29. Constituents also suggest that the Board should give more guidance identifying the circumstances in which the reliable measurement criterion will not be satisfied.

Possible counterarguments

30. In response, it could be argued that expected values are not necessarily more difficult to measure reliably than most likely outcomes:
- (a) the objective is to measure the amount the entity would rationally pay to settle or transfer the obligation. As the measurement guidance accompanying the revised standard will clarify, the entity does not need to have perfect information about the possible outcomes in order to estimate this amount. The entity uses the information that is available. An entity involved in legal proceedings ought to obtain information about all the possible outcomes, irrespective of the accounting requirements. It needs to do so to make rationale decisions about whether and how it should continue to defend the case.
 - (b) expected values are not necessarily less reliable than most likely outcomes. Although an expected value calculation requires management to quantify a greater number of outcomes, the resulting measurement might be less sensitive to errors in estimates of those outcomes. Suppose an obligation could have three very different outcomes. If management slightly mis-judged the probabilities of each one, the expected value could be slightly too low or too high. But the most likely outcome could be completely wrong.
31. There could of course be some situations in which liabilities cannot be measured reliably. Such situations could include major legal proceedings involving huge claims (perhaps class actions) and for which there are few or no precedents to provide evidence of possible outcomes. However, in such cases, it is also unlikely that the most likely outcome could be measured reliably. In other words, the proposed changes to the measurement requirements will not increase the number of liabilities that are incapable of reliable measurement.

32. On this basis, it could be argued that there is no need to remove the ‘extremely rare’ reference or to add guidance on the circumstances in which liabilities cannot be measured reliably. Preparers have applied IAS 37 up until now without such guidance. There is also a risk that by identifying features that *might* indicate that a liability cannot be measured reliably, the standard will inadvertently discourage recognition.

Possible content of further guidance

33. If the Board wished to give more guidance on the circumstances in which a liability cannot be measured reliably it could, for example:
- remind readers that the objective is to measure the amount that the entity would rationally pay to be relieved of the obligation. To achieve that objective, the entity does not need to have perfect information about the possible outcomes—it measures the amount on the basis of the evidence that is available.
 - note that the entity’s own experience of similar situations, or other entity’s experience of similar situations, normally provides the evidence needed to identify the possible outcomes and estimate the likelihood of each occurring.
 - suggest that the situations in which the liability cannot be measured are those in which the entity has insufficient evidence on which to base reasonable estimates of cash flows associated with different possible outcomes, or the probabilities of those outcomes. Such situations might arise if:
 - (i) the proceedings are unprecedented
 - (ii) the range of possible outcomes is vast, or

- (iii) the distribution of the outcome has a very long tail, ie some very unfavourable outcomes with low probabilities. The estimates of the present values of these outcomes would be highly sensitive to errors in the estimates of the probabilities of these outcomes occurring.

Staff recommendations

34. On the basis of the arguments in paragraphs 30-32, the staff recommend that:
- (a) the revised standard should continue to describe the circumstances in which liabilities cannot be measured reliably as 'extremely rare'; and
 - (b) no further guidance is needed on the circumstances in which a liability cannot be measured reliably.

Questions for the Board

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| 1 | Do you agree that the revised standard should continue to describe the circumstances in which liabilities cannot be measured reliably as 'extremely rare'? |
| 2 | Do you agree that no further guidance is needed on the circumstances in which a liability cannot be measured reliably? |
| 3 | If not, what further guidance would you add? |

SECTION 3 Practical problems for US entities

35. This section considers practical problems that US entities might have applying the IAS 37 recognition and measurement requirements to litigation liabilities. For US entities, the perceived problems arise from existing differences between IAS 37 and USGAAP requirements—not just the proposed changes.

The nature of the problem

Financial Accounting Foundation response to SEC roadmap

36. The problem was highlighted in a letter written by the Financial Accounting Foundation and Financial Accounting Standards Board (FASB) to the US Securities and Exchange Commission (SEC) on 11 March 2009. This letter responded to the SEC's *Roadmap for the Potential Use of Financial Statements Prepared In Accordance With International Financial Reporting Standards (IFRS) by U.S. Issuers*.¹²
37. The response explains that the FASB and IASB are working together on projects identified in a Memorandum of Understanding (MoU) that are aimed at improving both sets of standards in critical areas. It goes on to note that the MoU does not comprehensively address all existing differences or areas where IFRSs provide limited guidance. It then says:

¹² The letter is available on the FASB website home page www.fasb.org. (Posted 3/11/09.)

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Moreover, several aspects of current IFRS might be difficult to apply in the U.S. For example, the IFRS standard on contingent liabilities has been argued to be incompatible with the legal environment in the U.S. because preparers would be compelled to reveal potentially damaging information about their litigation. Areas of accounting such as this represent potential challenges in any path forward that includes U.S. adoption of IFRS in its current form.

38. The problem stems from differences between US GAAP and IAS 37 recognition requirements for litigation liabilities.

Current US GAAP requirements

39. The US GAAP requirements relating to recognition of litigation liabilities are in FASB Statement No. 5 *Accounting for Contingencies* (FAS 5).
40. FAS 5 requires entities to recognise loss contingencies if available information indicates that:
 - (a) it is probable that an asset has been impaired or a liability has been incurred at the reporting date; and
 - (b) the amount of loss can be reasonably estimated.
41. These requirements might appear to be similar to those of IAS 37. However, they are interpreted differently. 'Probable' is defined in FAS 5 as meaning 'likely'. And 'likely' is interpreted in practice to be a much higher threshold than the 'more likely than not' threshold applied in IAS 37. The American Bar Association's *Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information*, which all US lawyers follow when responding to audit enquiry letters, reinforces the notion that 'probable' is a very high hurdle:

An unfavorable outcome for the client is probable if the prospects of the claimant not succeeding are judged to be extremely doubtful and the prospects for success by the client in its defense are judged to be slight.

42. In other words, lawyers advise that a loss is ‘probable’ only if the case is a lost cause.
43. Defendants are required to disclose the *nature* of any legal proceedings if there is at least a ‘reasonable possibility’ that a loss may have been incurred. However, FAS 5 defines ‘reasonable possibility’ as meaning anything more likely than remote. So a defendant that discloses that there is a reasonable possibility of loss from legal proceedings is not giving much away about management’s views on the likely outcome.

Why applying IAS 37 recognition requirements would cause problems

44. If US companies were to apply the existing IAS 37 requirements, they would need to recognise litigation liabilities whenever management judged it to be ‘more likely than not’ that the entity had a liability (that could be measured reliably).
45. It has been argued that this would cause problems in the US because of the nature of the US legal environment. In the US, information that an attorney passes to a client’s auditor as part of the audit loses its attorney-client privilege and is ‘discoverable’ by the plaintiff. A statement by a defendant’s attorney, whether in the standard audit response letter or another form, that it believes that it ‘is more likely than not’ that the defendant has a liability could easily be used by the plaintiff’s attorney to sway a jury.
46. The problem would still arise if the proposed revisions to IAS 37 come into effect. Although there would no longer be an explicit ‘more likely than not’ threshold for identifying liabilities, the threshold would not be raised to the ‘lost cause’ threshold used in practice to apply FAS 5. The entity management would need to use judgement to determine whether the entity had a liability and auditors may need quite specific legal information to audit that judgement. Some people argue that the proposed changes to IAS 37 would exacerbate existing problems: the removal of the ‘probability recognition criterion’ means that lawyers could not just comment on the likely outcome of the case; they would have to comment on whether the entity is liable. The fear is that the

attorneys would not be willing to give these views in responses to audit enquiry letters and that, as a result, auditors would have to include disclaimers in their audit opinions.

47. Lawyers have also argued that discovery of the information needed to audit expected value measurements would also be damaging. Estimates of the outcomes and their associated probabilities could reflect strategic considerations about how the entity plans to defend the case. For example, the entity might plan to try to have the case moved to another jurisdiction, and that outcome might have a 20% likelihood of success. Discovery of this information about the defence strategy could give the plaintiff the upper hand.

Proposed changes to US GAAP

48. Also relevant to this matter are FASB proposals to amend FAS 5.
49. In September 2007, the FASB added a project to its agenda on the accounting for some non-financial liabilities and contingencies, including contingencies within the scope of FAS 5. Originally, the Board intended to conduct this project in two phases:
- (a) a short-term phase to amend and enhance the disclosure requirements for FAS 5 contingencies; and
 - (b) a long-term phase to comprehensively reconsider the recognition and measurement guidance for some non-financial liabilities.

However, in June 2008, the FASB removed the long-term phase of this project from its agenda. The FASB decided that it would instead consider at a future date whether to address recognition and measurement in a joint project with the IASB. The FASB project now focuses exclusively on loss contingency disclosures.

50. In June 2008, the FASB issued an Exposure Draft, *Disclosure of Certain Loss Contingencies*.¹³ The Exposure Draft aims to address concerns that existing disclosures do not provide sufficient information to enable users to assess the likelihood, timing, and amounts of cash flows associated with loss contingencies.
51. The proposals would significantly increase the amount of information that defendants have to disclose about legal proceedings. Among other things, the entity would have to disclose:
- (a) the amount of the claim or assessment against it or, if there is no claim or assessment amount, the entity's best estimate of the maximum exposure to loss.
 - (b) a description of the factors that are likely to affect the ultimate outcome of the contingency along with their potential effect on the outcome;
 - (c) the entity's qualitative assessment of the most likely outcome of the contingency;
 - (d) significant assumptions made by the entity in estimating the exposure to loss and assessing the most likely outcome; and
 - (e) qualitative and quantitative descriptions of the terms of relevant insurance or indemnification arrangements that could lead to a recovery of some or all of the possible loss.
52. Responses to the FASB Exposure Draft indicated that, although users generally supported the proposals, preparers and attorneys were concerned that some of the proposed requirements would require preparers to disclose prejudicial information and waive attorney-client privilege and other protections.

¹³ www.fasb.org/draft/ed_contingencies.pdf

53. The FASB sought to find common ground among constituents at round-table meetings, which it held in March 2009. At the meetings:
- (a) there was a broad consensus that the disclosure requirements should focus on the contentions of the parties, rather than predictions about the outcome of the legal proceedings.
 - (b) there was also broad consensus that disclosures should provide a baseline of information that is already publicly available about a case, and a reference to where financial statement users can find more information about the case if they wish to perform additional research.
 - (c) there was robust discussion, but no broad consensus, about whether entities should have to disclose amounts claimed by plaintiffs, potential recoveries through insurance or indemnification arrangements or information about legal proceedings whose likelihood of loss is remote but whose potential effect on the entity could be severe.¹⁴
54. The FASB will redeliberate the proposals in the light of the feedback it has received. It has not yet scheduled dates for the redeliberations because project staff are temporarily engaged on other work. The FASB aims to issue the final requirements by the end of Quarter 3 2009.

¹⁴ Minutes of the meetings are on the FASB website at http://www.fasb.org/project/accounting_for_contingencies.shtml

Options for the IASB

55. The Board needs to consider what action it should take in response to US concerns. One possibility would be to allow defendants in contested lawsuits not to recognise a liability if they disclose specified information instead. The disclosure requirements could be the same as those that the FASB eventually decides upon for FAS 5. The FASB has put a lot of work into developing disclosures that balance users' needs for relevant information with US preparers' and attorneys' concerns about prejudicial disclosures.
56. The Board would first need to consider whether changes to the IAS 37 recognition requirements are actually necessary. It is possible that:
- (a) the 'reliable measurement' recognition criterion and the 'prejudicial information' disclosure exemptions are sufficient to avoid most problems.
 - (b) there are other ways round the problem of waiver of attorney-client privilege. For example, it might be possible that auditors could obtain the information they need from materials that are protected in ways other than attorney-client privilege.
57. The Board would also need to consider whether to resolve the matter as part of this project, or as a separate exercise. In favour of resolving the matter as part of this project, it could be argued that:
- (a) the Board would address one of the perceived obstacles to US adoption of IFRSs as quickly as possible.
 - (b) if the Board concludes that changes are necessary, changing the standard twice in a relatively short period would impose additional burdens on our constituents.
 - (c) many entities that apply IFRSs have operations in the US and these operations are subject to the US legal environment. The issues discussed in this section might already affect some of those entities.

58. In favour of resolving the US concerns as a separate exercise, and finalising the other changes to IAS 37 now, it could be argued that:
- (a) any necessary changes would be of limited application (ie contentious lawsuits only) and would slot discretely into IAS 37 without significant changes to the rest of the standard. Therefore, making those further amendments to the standard at a later date would not impose significant widespread burdens preparers, users and others.
 - (b) this is a matter that needs further investigation. Resolving it within this project could delay the completion of the project. It might take some time, and expert advice, to work out whether the changes are needed. And it might take some time for the FASB to finalise its proposed disclosure requirements. Although it intends to issue the requirements in the third quarter of 2009, it still has to redeliberate the proposals in the light of the feedback from the round-table meetings. Balancing the users' desire for information with the preparers' and attorneys' concerns about disclosure of prejudicial information is taking longer than the FASB had initially expected.
 - (c) the primary justification for making any amendments will apply only if and when the US adopts IFRSs. The exercise to identify, draft and consult upon any necessary amendments should proceed in parallel with other work on potential US adoption, not ahead of it.

Staff recommendation

59. The staff think this is a matter on which we need direction from the Board. So we make no recommendations.

Question for the Board

How should the Board proceed on this matter?