



NEW YORK  
CITY BAR

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September 16, 2010

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*Via email:* director@fasb.org

Re: Proposed Accounting Standards Update – Disclosure of Certain Loss  
Contingencies (File Reference No. 1840-100)

Dear Mr. Golden:

This letter is submitted on behalf of the Committee on Financial Reporting and the Committee on Securities Regulation of the Association of the Bar of The City of New York (the “Committees”) in response to the request of the Financial Accounting Standards Board (the “FASB”) for comment on the FASB’s proposed accounting standards update relating to disclosure of certain loss contingencies (the “Reproposal”).<sup>1</sup> Our Committees are composed of lawyers with diverse perspectives on financial reporting matters, including members of law firms and counsel at major corporations, financial institutions, public accounting firms and institutional investors. A list of members of each Committee is attached as Annex A to this letter.<sup>2</sup>

Our Committees recognize that financial statement users seek meaningful and timely information to assess the likelihood, timing and magnitude of potential litigation losses.

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<sup>1</sup> Exposure Draft, *Proposed Accounting Standards Update – Disclosure of Certain Loss Contingencies*, File Reference No. 1840-100 (July 20, 2010).

<sup>2</sup> This letter does not necessarily reflect the individual views of each member of the Committees or the institutions with which they are affiliated.

There are, however, two features of litigation contingencies that differentiate them from other matters considered in the financial statements. First, predicting the future course and outcome of a particular litigation matter is often a difficult, complex and uncertain exercise of judgment. Second, disclosure about matters in litigation can put a public company at a tactical disadvantage and exacerbate the very risk it is intended to describe. The first feature sharply limits the potential benefits of requiring additional disclosure, while the second feature represents a significant cost of doing so.

Although the Reproposal strikes a better balance among these competing considerations than the FASB's June 2008 proposal (the "Original Proposal"),<sup>3</sup> it would still require disclosures that are likely to be prejudicial to a public company in the context of a particular litigation. The disclosures public companies make about outstanding litigation are routinely reviewed by their adversaries, who attempt to use those disclosures in court for their own advantage. In addition, the vast majority of civil and regulatory matters are resolved through negotiated settlements. Providing an adversary with critical information about a company's internal assessment of the likely outcome, or its internal estimate of the loss or range of loss, can significantly affect those negotiations in a manner that is adverse to the company making the disclosure, and consequently to its investors. Even more importantly, assessing the likely outcome and estimating the amount of loss generally requires the assistance of counsel. Disclosing these assessments and estimates threatens the protections of the attorney-client privilege and work product doctrines, which are fundamental principles developed by the courts to avoid having the process of obtaining legal advice and preparing for trial affect the outcome of a case.

We do not believe that the potential benefits of the Reproposal's additional disclosures will justify or outweigh these adverse consequences. Uncertainty among financial statement users about the potential impact of litigation contingencies is not primarily due to inadequate disclosures. The uncertainty is a consequence of the nature of litigation, and it will not be dispelled by requiring additional disclosures. Accordingly, we believe the FASB should make several important changes to the standard outlined in the Reproposal, as described below.

We are also concerned about the divergence between U.S. GAAP and IFRS on the topic of loss contingencies. We would support the coordination of the FASB and the International Accounting Standards Board (the "IASB") to develop a global standard.

***1. There should not be a general requirement to disclose the amount accrued for a probable loss.***

The Reproposal requires disclosure of the amount accrued for litigation losses, and a tabular reconciliation, or "roll-forward," of that amount showing changes each quarter. It will often be possible for adversaries to trace accruals to a particular litigation, particularly where the company is small or has a single major litigation. The FASB acknowledged this risk in the Reproposal, noting that it had "decided to permit aggregation by class of contingencies to

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<sup>3</sup> Exposure Draft, Proposed Statement of Financial Accounting Standards, *Disclosure of Certain Loss Contingencies, an Amendment of FASB Statements No. 5 and 141(R)*, File Reference No. 1600-100 (June 5, 2008).

address concerns about prejudicial disclosure of individual contingencies,” but in too many instances aggregation will not effectively safeguard accruals with respect to a particular matter from the adversaries in that matter. The accrual for a particular litigation, once disclosed, is likely to operate as a “floor” for settlements of the relevant claims that might otherwise be resolved by the company on more favorable terms. This will make the disclosure potentially outcome-determinative of the contingency itself, in a manner adverse to the company and its investors.

The existing standard already requires disclosure of an accrual where it is necessary to prevent the financial statements from being misleading.<sup>4</sup> In addition, under the rules of the Securities and Exchange Commission, management’s discussion and analysis (MD&A) in a company’s periodic reports must address matters that are material to the company’s financial condition or its financial performance, or that are reasonably expected to have a material impact in the future.<sup>5</sup> To comply with these requirements, companies discuss litigation accruals and other matters relating to litigation contingencies, if they are, or could be, material. However, the amounts accrued often are not material to a company’s financial condition or performance, and in such cases there is no benefit to financial statement users to disclosing them.

In light of these considerations, we believe that imposing a generally applicable requirement to disclose accruals and changes in accruals will prejudice many companies without adequate justification. An exception for prejudicial information will not successfully mitigate this prejudice. In practice, the threshold for relying on the exception is likely to prove high and difficult to specify with precision, and the exception therefore would be problematic to implement and to audit. Accordingly, we respectfully suggest that the existing standard for disclosure of accruals be retained.

**2. *A company should be permitted to aggregate all litigation contingencies on a consolidated basis.***

If the existing standard for disclosure of accruals is not retained, aggregation of contingencies, as the Reproposal recognizes, will be an important way for companies to reduce

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<sup>4</sup> ASC 450-20-50-1.

<sup>5</sup> The MD&A requirements for periodic reports under the Securities Exchange Act of 1934, as amended, are set forth in the Commission’s Regulation S-K, Item 303(a)(3) (annual periods) and Item 303(b) (interim periods), and Form 20-F, Item 5 (foreign private issuers), together in each case with the related instructions. Periodic reports must also include “such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.” Rule 12b-20. In contrast to disclosure included in the financial statements, a forward-looking statement made in MD&A or elsewhere in the non-financial portion of a prospectus or periodic report benefits from the safe harbor for forward-looking statements provided by the Private Securities Litigation Reform Act of 1995. Accrual disclosure in footnotes does not have this protection and could well invite litigation when a related contingency is resolved for an amount in excess of the accrual, no matter how reasonable the accrual was when made. In our view, this is a further reason weighing against adoption of a general requirement to disclose accruals.

the resulting prejudice. But the guidance concerning aggregation effectively requires contingencies to be broken down by class or type, both in the disclosure of accruals and in the disclosure of possible loss or range of loss. This will make aggregation ineffective to reduce prejudice. A particular matter may be alone in its class or may make up the bulk of its class so that, even when aggregated with one or more smaller claims, the amount of the provision or estimate of possible loss for the claim will be evident.

The fine distinctions among classes contemplated by the Reproposal heighten this concern, because they contemplate dividing contingencies into small, narrow classes. The distinctions would appear to be unworkable and needlessly burdensome to develop and audit. In addition, the classification of particular proceedings conceivably could change over time, making period-to-period comparisons difficult and presenting challenges for the auditing process. We believe this is not justified by the needs of users and would result in disclosures that are immaterial to the financial statements, but highly prejudicial to the company.

We would propose that aggregation be expressly permitted on an overall basis for the consolidated company as a whole, for purposes of both the disclosure of accruals (including the tabular reconciliation) and the disclosure of estimates of possible loss or range of loss. If the FASB does not accept this suggestion, it should at least revise the standard and the guidance to permit aggregation based on simple, disclosed criteria at the company's discretion. Such an approach would be comparable to the current IFRS disclosure requirements for loss contingencies.<sup>6</sup>

**3. *The requirement for disclosure of asserted remote contingencies with potential severe impacts should be eliminated.***

We oppose the requirement for disclosure about asserted remote contingencies that could expose a company to a "potential severe impact." Companies regularly face high-claim, low-probability suits. Determining whether to classify such a claim as remote can involve difficult judgments, about which companies typically are conservative. Applying a further standard of "potential severe impact" to claims that are already in the "remote" category will require a further level of difficult judgments, which will be inconsistent with other reporting standards and will present auditing difficulties. Moreover, the Reproposal would not appear to

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<sup>6</sup> Where aggregate information is presented, the Reproposal also calls for additional disclosures that are problematic. One example is information about (i) the average amount claimed and (ii) the average settlement amount. Neither provides useful information to financial statement users about the nature or potential magnitude of loss contingencies, particularly where the number of cases involved is small and the average could be skewed, for example by inflated claims or unique settlements. The amount of a plaintiff's demand is not a reliable indication of the actual amount paid when the claim is resolved, and disclosure of the "average" amount claimed would only further exacerbate the potential confusion. Similarly, requiring disclosure about the "average" settlement amount would suggest that this information is relevant to the outcome of the remaining loss contingencies, when instead the average could be significantly higher or lower but for one or two settlements that are not indicative of the settlement prospects for the remaining loss contingencies. We therefore would recommend that these two examples be eliminated from the final standard.

allow consideration of probability in evaluating potential severe impact, so that impact must be measured even if a claim is so remote as to present a trivial risk.

Additional disclosure about matters classified as remote will not significantly aid an investor's understanding of the company's financial prospects. Financial statement users would be presented with disclosure that is speculative and theoretical, which would create confusion and misunderstanding about the company's actual exposure. The requirement is also inconsistent with other disclosure standards under U.S. GAAP and the federal securities laws (which generally focus on materiality), and with IFRS, which does not require disclosure of remote contingencies.

It is appropriate for a company to consider the totality of relevant circumstances in determining whether disclosure is warranted. The Reproposal, however, excludes a key input from this analysis—namely, potential insurance and indemnification recoveries, which are the main ways companies seek to avoid financial disruption. As discussed below, the FASB should permit companies to consider insurance and indemnification recoveries in determining whether disclosure is appropriate. In addition, the FASB should make clear that any new standard adopted does not limit a company from considering other available ways to mitigate financial disruption. This would be consistent with the commentary in the Reproposal explaining that a company should assess its “specific facts and circumstances” to determine whether disclosure should be made.

**4. *The FASB should not prohibit companies from considering possible insurance or indemnification recoveries in determining whether disclosure of a loss contingency is required.***

By prohibiting consideration of possible insurance or indemnification recoveries in determining the need for disclosure, the Reproposal will likely expand significantly the number of contingencies subject to disclosure. Companies consider possible insurance or indemnification recoveries in determining the need for disclosure – depending of course on the underlying facts and circumstances – and they should be permitted to continue doing so. Materiality determinations under the securities laws are required to be based on relevant facts and circumstances, and mandating that certain facts be disregarded is inappropriate.

The Reproposal cites some commenters' views that insurance coverage is often “uncertain” and may be subject to litigation with the insurer. This fails to acknowledge the central role of insurance in risk management and timely claims resolution. Indeed, in U.S. federal courts, the importance of insurance to motivate settlement is reflected in mandatory discovery of certain insurance information.<sup>7</sup> Indemnification, contribution and similar arrangements are key elements of commercial transactions on which all parties rely in evaluating a transaction and the resulting risk of loss. Indemnification and contribution arrangements in securities offerings and business combination transactions are just two examples. To ignore this business reality distorts the picture of a company's exposure.<sup>8</sup> Moreover, loss contingencies are

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<sup>7</sup> Fed. R. Civ. P. 26 (a)(1)(A)(iv).

<sup>8</sup> For example, for financial institutions that underwrite large numbers of securities offerings and typically face significant volumes of securities litigation, a determination of loss contingency

themselves uncertain; it seems inappropriately asymmetric to exclude consideration of these common mitigating factors on the grounds that they are also contingent. In a standard that is otherwise driven by highly fact-intensive inquiries, it is inconsistent to exclude consideration of these recoveries. Any new standard should instead caution companies to give due consideration to the likely timing and magnitude of recoveries, as well as factors that may prevent or delay them in whole or in part.

**5. *The nature and scope of the required narrative disclosures should be narrowed to eliminate disclosure that is unlikely to be useful to investors and may be prejudicial to companies.***

The Reproposal eliminated many of the most problematic disclosures called for by the Original Proposal. However, the qualitative and quantitative disclosure requirements contained in the Reproposal are needlessly granular; as a result, they will be costly to comply with and will elicit lengthy and inconsistent disclosure that is of little use to investors or that may be prejudicial to companies. For the reasons outlined below, we believe the disclosure requirements set forth in paragraphs 450-20-50-1F(a)-(f) of the Reproposal should be limited to: (i) the publicly disclosed contentions of the parties, stated in general terms; (ii) if known, the anticipated timing of, or the next steps in, the resolution of individually material asserted litigation contingencies; (iii) for individually material contingencies, sufficiently detailed information to enable users to obtain information from publicly available sources such as court records; and (iv) the amount of damages claimed by the plaintiff or regulator, if the amount is publicly available.

We recommend limiting the required narrative disclosures in this way because the other disclosures called for by the Reproposal present the following concerns, among others:

(a) The amount of damages indicated by expert testimony may not be useful disclosure. Litigation is an adversarial process that often features a “battle of the experts.” A company is likely to challenge, not credit, testimony by a plaintiff’s expert and often challenge the expert’s very qualifications to testify as such. For these reasons, it would not be unreasonable (or uncommon) for a company to conclude that the required disclosure would in fact be misleading. Even if mitigating disclosure were permitted (*e.g.*, about the company’s expert testimony), it is difficult to see the value of presenting competing expert testimony to investors, since it will present a necessarily incomplete and confusing perspective about the potential magnitude of the loss contingency.

(b) The Reproposal would require disclosure of other “publicly available” quantitative information, but does not provide any guidance about how this criterion should be applied. Publicly available quantitative information about potential loss may be speculative and unreliable, and it could be read to include third-party information such as news reports. Even if the provision were limited to publicly available quantitative information provided in the proceeding, its credibility will in virtually all cases be in dispute and such information is likely to present an incomplete and confusing picture to investors. The provision also does not explain

how this element would relate to non-litigation contingencies, but we believe similar concerns could also be present in those cases.

(c) The exposure draft's proposed requirement that public companies disclose "other nonprivileged information that would be relevant to financial statement users to enable them to understand the potential magnitude of the possible loss" is particularly problematic.<sup>9</sup> Some of the difficulties of the proposed requirement are discussed below.

- The determination of what information is privileged is often very contentious and can take months or even years to resolve. If a court ultimately concludes that certain information is not privileged, a public company asserting privilege claims in good faith could be criticized for not having disclosed the information sooner in its financial statements. On the other hand, if a company discloses information in its financial statements that might be privileged, the potential claim of privilege would be waived to the detriment of the company and its investors.
- This disclosure requirement inadvertently goes beyond what the litigation process itself requires of a litigant. In most courts, a litigant is only required to provide nonprivileged information in response to specific requests or certain required disclosures. Litigants are generally not required to decide what information is "relevant" to their adversaries' claims and to disclose that information affirmatively. Imposing such an obligation on public companies through their financial disclosures would upset the delicate balance of discovery struck by the judicial system, putting public companies at a disadvantage to individuals and private companies in litigation.
- Requiring the disclosure of nonprivileged information related to the potential magnitude of loss may force companies to disclose privileged information in order to prevent the disclosure from being confusing or misleading to investors. In the litigation context, the type of information that is typically discoverable is factual information that, without additional context or analysis, is unlikely to be useful to investors and could present a misleading picture. In that circumstance, companies would effectively be required to disclose analysis or other information that may otherwise be privileged or confidential in order to prevent their disclosure from being misleading.
- This disclosure requirement would be particularly unworkable in large and complex cases where it can take months or years for a court to determine which claims are legally viable and what time periods and issues are legitimately within the scope of discovery and which facts are relevant to the potential compensatory and punitive damages. Until those issues get resolved (and many of them remain contested throughout the course of the litigation and even thereafter on appeal), determining the boundaries of what "other nonprivileged information" is "relevant" to assessing the potential magnitude of a potential loss is not possible

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<sup>9</sup> By contrast to the proposed requirement, if the disclosure identifies the caption of the case, and the presiding court, an individual user of financial statements that wishes to obtain and review the court documents, which are publicly available, can always do so.

without invading the province of the court and making assumptions (which could be prejudicial) regarding how the court may decide certain critical issues.<sup>10</sup>

- The attorney work product doctrine protects counsel’s compilation and analysis of facts in preparing for litigation, including counsel’s determination of what facts are potentially relevant to the issue of potential damages. The proposed disclosure standard, by requiring a public company to disclose which facts its counsel has determined are relevant to the potential magnitude of the potential loss, would undermine that doctrine by requiring public companies to disclose information reflecting the mental impressions of its counsel. The proposed limitation to “nonprivileged information” does not eliminate this concern because the doctrine protects counsel’s process but not the information itself. In addition, the rule is potentially ambiguous as to whether attorney work product is covered by the “nonprivileged information” limitation because in some jurisdictions the attorney work product doctrine is not technically considered a privilege. FASB should make clear that it does not intend to require disclosure of information that is protected by the work product doctrine.
- Certain information relevant to the potential magnitude of loss may not be privileged, but may still be confidential or subject to court orders preventing disclosure. For example, information received from an adversary pursuant to a protective order requiring it to be kept confidential may be relevant to the magnitude of a potential loss, but would not be privileged. By requiring public companies to disclose such information, the proposed disclosure requirements would put public companies in the untenable position of being forced to choose between complying with FASB’s guidance or a court order prohibiting the disclosure of that nonprivileged information.

(d) The requirement to provide information about recoveries from insurance or other sources that has been provided to plaintiffs or is “discoverable” by a plaintiff or regulatory agency, or that relates to a recognized receivable, raises several concerns.

- Disclosing information about insurance or other recoveries that has been provided to plaintiffs or is otherwise discoverable will not necessarily provide investors with a complete understanding of the company’s coverage position. With respect

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<sup>10</sup> For example, many cases are asserted as purported class actions. Until the court decides whether the case will proceed as a class action (and any related appeals are resolved) and how that class will be defined (in terms of membership and time), it would not be possible for a public company to determine the scope of information that would be relevant to the potential losses associated with those claims. In other cases, plaintiffs assert claims that may be barred by statutes of limitation, and this issue may not be resolved until the end of a trial, if then. In that context, the public company would not have a reasonable means of determining whether nonprivileged information related to these claims are “relevant” to the case until the court itself makes that determination. Even in comparatively simple cases, determining whether certain information is “relevant” to the potential damages associated with a case may depend on whether the court finds certain evidence admissible, and that determination may not be made until trial itself and even then may be contested on appeal.



to insurance recoveries in particular, the type of insurance information that is typically discoverable in a litigation context is the insurance policies themselves, which are complicated documents. Disclosing the text of a company's insurance policies would not be helpful to investors and in some cases could be misleading unless the company also explains the policies to investors. Including that sort of disclosure, though, could put a company at a disadvantage in the subject litigation by effectively forcing it to disclose an analysis of its insurance policies that would not otherwise be available to plaintiffs.

- The requirement effectively compels companies to evaluate whether information is, in fact, discoverable and, if so, to disclose it, even if that information has not been affirmatively sought by plaintiffs or regulators and is not otherwise required to be provided to them. There is no objective test for discoverability. Whether information is provided through the discovery process in a particular litigation is typically the result of an extended push-and-pull between the defendant and the plaintiff that is ultimately decided by the court after weighing a number of competing concerns. As a result, companies are not in a position to easily or accurately categorize information as "discoverable." This would make it difficult for a company ever to be comfortable that it has adequately complied with the requirements of ASC 450.
- Providing information about insurance or other recoveries to a plaintiff in a particular litigation does not mean that the information is publicly available or would be discoverable in other litigation. Public disclosure, including the amount of any recognized receivable, could put the company at a disadvantage with respect to other plaintiffs and in any disputes with insurers or other sources of recovery. Publicly disclosing the company's insurance coverage position and the scope of its policies (including defense cost coverage), or the extent of other sources of recovery, could also make the company a more attractive litigation target generally.
- Some of the disclosure examples in the Reproposal include a discussion of insurance deductibles. The amount of a deductible under a particular insurance policy, and the manner in which the deductible is applied, usually depends on the particular circumstances and so is subject to legal interpretation and analysis. Requiring a company to disclose its conclusions about the applicability of a deductible could put it at a disadvantage with respect to plaintiffs in the subject litigation, other adversaries and its insurers. If, as we suggest above, materiality should govern disclosures about legal proceedings (moderated by considerations of prejudice to the company), then we submit that the same standard should also apply to the question of whether disclosure of deductibles is appropriate. In light of these concerns, we suggest that the requirement that a company disclose information regarding recoveries from insurance or other sources, including the particular terms of its insurance policies, be removed from the Reproposal.
- We also believe that it is inadvisable to mandate disclosure in all cases of a denial of coverage, or reservation of rights, by an insurer. Again, materiality should

govern this analysis. Reservations of rights are typically part of an insurer's response to a claim, and denials of coverage are often made on a routine basis regardless of the merits. Companies and their counsel are best positioned to determine whether this information is material to investors.

(e) The disclosures requested by the Reproposal will burden the notes to the financial statements with extensive information that will create unjustified auditing challenges.

In summary, many of the disclosures contemplated by the Reproposal state open-ended principles that will be difficult and time-consuming to apply and involve information and assertions developed in the context of litigation or other adversarial processes in which the "facts" are often the subject of debate. Removing such information and assertions from their litigation context and introducing them into financial statement disclosure will provide only limited insight at best and will more likely be confusing or misleading to investors, while it will often be prejudicial to reporting companies.

**6. *The exemption for disclosure of prejudicial information should be retained.***

We recognize the difficulties described in the Reproposal with respect to auditing a company's reliance on an exemption for prejudicial disclosure and the impact it could have on the attorney-client privilege. We also recognize that, as noted in the commentary to the Reproposal, it eliminates "many of the [Original Proposal's] proposed disclosures that are less factual and more speculative in nature." Although the Reproposal represents a significant improvement in this respect, it does not go far enough. The Reproposal continues to call for disclosure that can be highly prejudicial to a company's litigation posture, particularly given today's high-stakes U.S. litigation environment. For the reasons discussed above, we believe the resulting harm to companies and their investors—who of course bear the ultimate costs that flow from adverse outcomes—would outweigh the benefits to financial statement users. Therefore, we believe that the exemption for prejudicial disclosure should be retained.

**7. *The FASB should modify the implementation timetable for the final standard.***

Even if the issues we raise above are adequately addressed in the final standard, the proposed amendments will require significant adjustment to the procedures companies currently undertake, the internal controls they currently apply and the procedures their auditors follow with respect to potential loss contingencies. Therefore, particularly given the sensitive issues raised by the new disclosures, we believe that implementation of the new standard should allow companies and their auditors to do this in a thoughtful way. We also believe it would be highly desirable for the FASB to coordinate the content of its standards with those being developed for IFRS. Accordingly, we recommend that the effective date of the new standard be extended – ideally in coordination with the IASB – but in any case so that it applies no sooner than for fiscal years ending after December 15, 2011.

Mr. Russell G. Golden  
Technical Director  
Financial Accounting Standards Board, p. 11

We would be pleased to respond to any inquiries regarding this letter or our views on the Reproposal more generally. Please contact any of Nicolas Grabar or Adam Fleisher at (212) 225-2000 or Robert Buckholz at (212) 558-4000.

Very truly yours,

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