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Via Electronic Mail: director@fasb.org

Technical Director - File Reference No. 1025-300 Financial Accounting Standards Board 401 Merritt 7 P.O. Box 5116 Norwalk, Connecticut 06856-5116



LETTER OF COMMENT NO. 52



Re: No. 1025-300; June 5, 2008; Proposed Statement of Financial Accounting Standards; Disclosure of Certain Loss Contingencies an Amendment of FASB Statement Nos. 5 and 141(R).

Dear Sir or Madam:

1 write to express my concerns over the proposed amendments to FAS 5 and FAS 141(R), with respect to disclosures of certain loss contingencies. The proposed amendments the Financial Accounting Standards Board has circulated would create poor and inconsistent disclosures, unfairly prejudice reporting companies in litigation, and induce risks of new and costly litigation. The current standards provide a reasonable amount of information with respect to such loss contingencies and adequately balance a corporation's interests in avoiding speculative disclosure and limiting privileged and prejudicial disclosures.

1. The Proposed Amendments Would Provide Poor Disclosure with Respect to Claims in Litigation.

Experience shows that many claims in litigation are not susceptible to meaningful analysis and valuation until a late stage-even when some risk beyond "remote" is reasonably assumed. For example, in litigation where each party has a claim or counterclaim, the range of reasonably possible outcomes may swing wildly from negative to positive and the valuation of a loss contingency may depend heavily on the evaluation of a counterclaim. A company's evaluation of litigation will change over time as new facts are uncovered and legal theories are developed. Add to the mix of considerations the fact that the vast majority of cases settle or are dismissed before a jury verdict and it becomes clear that early assessments based on limited facts and analysis do not provide meaningful disclosure to investors. Such disclosures will simply provide speculative numbers that will in many cases vary greatly between reporting periods as the exposure is perceived as being more or less "remote." Even where a range of outcomes has been projected internally (attorneys generally value cases in ranges—the notion that a reliable single case value can be established well in advance is grossly mistaken), that information would in every case be extremely prejudicial to the company if given to the opposing side in litigation. When a company chooses not disclose these values and the reasoning behind them under the proposed exemption from disclosing prejudicial information, but is nevertheless compelled to disclose a "maximum exposure to loss," investors will have received not better disclosure, but misleading disclosure.

2. The Proposed Amendments Prejudice a Company's Ability to Manage Claims in Litigation and Execute Defense Strategies.

The proposed amendments would diminish a company's ability to properly analyze and manage claims in litigation. The proposed requirements would force companies to choose between disclosing key aspects of defense analysis and strategy or risking shareholder claims and regulatory enforcement actions for inadequate disclosure. My own view is that far from being "rare," the disclosure of information described in paragraph 7 of the proposed amendments would be prejudicial in nearly every case, even when aggregation is possible. Public discussion of such

quantitative and qualitative factors would be devastating to the legitimate claim management strategies of nearly every public company. Even disclosing that certain information has been omitted because of its very prejudicial nature, and describing why puts companies in an untenable situation in important litigation.

Sophisticated plaintiffs' attorneys will be able to leverage the such estimates (easily derived in many cases, even if aggregation is possible, as the aggregated estimates including new claims may be compared to prior disclosures and public court records) to extract higher settlements from reporting organizations. Additionally, the prospect of negative impact from speculative disclosure would give plaintiffs much greater leverage in settling a claim prior to the next periodic report filing deadline. Companies will feel pressure to agree to unfavorable early settlements to avoid disclosing an enormous and inexplicable (and likely misleading) loss contingency in the next quarterly or annual filing. After disclosure, companies would enter into negotiations with a pre-established floor in the minds of opposing litigants—who will know the price the company has already placed on to case. Plaintiffs will have zero incentive to accept a penny less than the disclosed value of a claim.

3. The Proposed Amendments Would Lead to Needless Additional Litigation.

The result of nearly every lawsuit is a surprise to someone—if all parties agreed on the likely outcome, most litigation would not occur. Experience shows that a judge or juries' reaction to trial proceedings is impossible to consistently and accurately predict. As another commenter has noted, when companies are forced to predict the unpredictable, at some point, the prediction will fail. In this case, the predictive disclosures are likely to be wrong more often than not. It is not difficult to imagine that shareholder class action lawsuits would be routinely filed against companies for disclosures which differ from actual trial results under the proposed amendments. I should point out that the fear of litigation over disclosure is not, by itself, a reason to avoid disclosure—but where required disclosure will of necessity be incorrect and misleading in most cases, then the costs of additional litigation must be considered.

Summary

Current disclosure requirements adequately protect reporting organizations and reasonably inform the public and investors. The proposed amendments would create poor and inconsistent disclosures, unfairly prejudice reporting companies in litigation, and induce risks of new and costly litigation. Beyond the comments I have made above, I also echo the comments provided by the Association of Corporate Counsel (No. 16), the Chicago Bar Association (No. 19), Ernst & Young (No. 23) and the American Bar Association (No. 36)—especially with regard to those comments regarding dangers the proposed amendments pose to attorney-client and attorney work product privilege.

Thank you for your consideration of my comments.

Vamo t- hank

James A. Lank

General Counsel and Corporate Secretary