

McDermott Will & Emery

Boston Brussels Chicago Düsseldorf Houston London Los Angeles Miami Munich
New York Orange County Rome San Diego Silicon Valley Washington, D.C.
Strategic alliance with MWE China Law Offices (Shanghai)

John J. Calandra
Attorney at Law
jcalandra@mwem.com
212.547.5489

August 7, 2008

By Email and First Class Mail

Russell G. Golden
Technical Director
Financial Accounting Standards Board
401 Merritt 7
PO Box 5116
Norwalk, CT 06856-5116



LETTER OF COMMENT NO. 64

Re: File Reference No. 1600-100, Proposed Statement of Financial Accounting Standards - Disclosure of Certain Loss Contingencies

Dear Mr. Golden:

McDermott Will & Emery LLP, an international law firm with over 1,100 lawyers worldwide, appreciates the opportunity to present its concerns relating to the June 5, 2008 draft entitled the "Disclosure of Certain Loss Contingencies—an amendment of FASB statements No. 5 and 141(R)" (hereinafter, the "Proposed Amendments"). Although we have concerns about many of the new disclosure requirements mandated by the Proposed Amendments, we confine our discussion herein to the following required disclosures, which we believe present the most serious problems: (a) the company's "best estimate of the maximum exposure to loss;" (b) its guess as to "the anticipated timing of its resolution;" (c) its "qualitative assessment of the most likely outcome" of the litigation; and (d) the "factors" and "assumptions" on which these guesses and opinions are based.

As discussed further below, the Proposed Amendments suffer from at least the following fatal defects: they will mandate the disclosure, and thus waiver, of privileged information; they create obligations that companies and counsel will find completely unworkable; they will give an unfair advantage to plaintiffs and encourage "strike suits;" they will discourage settlements; they will create tension between companies and their counsel; and they will give rise to a whole cottage industry of litigation which will be brought whenever companies and their counsel "guess wrong."

These concerns, in our view, outweigh the benefit of whatever additional information the market may obtain from the Proposed Amendments. Indeed, we submit that the market already has access to sufficient information relating to pending litigations. Analysts and traders typically contact law firms that are not involved in the relevant litigations and obtain their counsel as to

U.S. practice conducted through McDermott Will & Emery LLP.

340 Madison Avenue New York, New York 10173-1922 Telephone: 212.547.5400 Facsimile: 212.547.5444 www.mwem.com

the issues in the pending litigations, their likely outcomes, and the damage awards or settlements that may ensue. This information, in turn, is filtered back to the marketplace and reflected in the stock prices. In some respects, this information is more reliable since it comes from unbiased observers, rather than from the company itself. Any additional information that would be disclosed by the company itself under the Proposed Amendments would be useful (if at all, given its inherently speculative nature) *precisely because* it reveals counsel's mental impressions of the cases and the facts upon which they are based—information which is at the heart of the attorney-client privilege and work product doctrine. This leads us to our first concern—disclosure of privileged information.

If the Proposed Amendments are adopted, FASB will have given plaintiffs what no Court would ever allow—counsel's mental impressions, its views on possible outcomes, and the privileged information those impressions and views are based on. Even if the disclosures are made on an "aggregated" basis, plaintiffs may be able to obtain this information on a non-aggregated basis through discovery of the company and/or its auditors; and whatever privileges or protections that attach to such disclosures and other documents concerning the same subject matter might be deemed to have been waived. This risk is created as a result of judicial decisions which establish that disclosure *mandated* by the securities laws is nonetheless "voluntary" in the eyes of the law.

Additionally, the "prejudice" exception contained in the Proposed Amendments is of little help since, according to FASB, it would apply only in "rare" circumstances. Moreover, even in such a rare circumstance, a company would have to disclose why it would be prejudiced—a disclosure which itself would be prejudicial, as it would suggest the company is concerned it will lose the litigation. Furthermore, the company would still need to disclose its opinions, mental impressions and/or strategies as to its "maximum exposure to loss," "anticipated timing of its resolution," and the factors on which these are based.

Indeed, there is a direct conflict between FASB's goal of providing more "meaningful" disclosures to the investing public and the basic tenet of our adversarial system of jurisprudence, which is that adversaries do not reveal to one another their mental impressions of the case, or the privileged facts upon which these impressions are based. In our view, this fundamental tension is *not, and cannot be, reconciled or effectively addressed by the Proposed Amendments*. In fact, given the information that can already be obtained by and through independent observers, it will be the companies' adversaries in litigation, not the investing public, who will most benefit from a requirement to disclose the company's necessarily subjective views on the matters contemplated by the Proposed Amendments.

Plaintiffs will clearly gain an unfair advantage in litigation by obtaining from the defendants privileged information that defendants could never obtain from plaintiffs (as the Proposed Amendments cannot effect a reciprocal disclosure obligation on the plaintiffs). Plaintiffs will use the information obtained to (i) secure discovery and learn facts that they may not have otherwise realized existed; (ii) secure company admissions relating to liability and

damages; and (iii) hold out for more favorable settlements whenever companies' disclosures suggest that the companies' damages may be significant and/or the plaintiff will succeed on its claims. Additionally, since the existence of and/or the amount of settlement offers would be "factors" on which companies base their disclosures, the confidentiality of settlement offers could be jeopardized, thereby chilling the making of "confidential" settlement offers. Similarly, a company may be reluctant to make a more generous settlement offer if it believes that this would result in an increase in the amount the company previously disclosed and/or in a change of its previous prediction of the likely outcome of the litigation. On the other hand, plaintiffs' counsel will have an incentive to bring "strike suits," claim greater damages (no matter how unreasonable), and/or make inflated settlement demands, all to force companies to choose between having to disclose more sizeable loss contingencies, or to settle at inflated amounts.

Additionally, the Proposed Amendments are both unworkable and apt to create needless tension between companies and their counsel. Indeed, at the time a disclosure would become necessary companies and their counsel are unlikely to have sufficiently learned and developed all of the facts necessary to issue an informed opinion as to the company's "maximum exposure to loss," and/or "most likely outcome" of the litigation. Further, asking the company to opine as to "the anticipated timing of the resolution" requires, at best, rank speculation. At worst, such a requirement may force a company to reveal (directly or indirectly) the amount it believes the matter could be settled for, and when, as such "factors" undoubtedly impact the "timing" of the resolution.

Moreover, requiring opinions as to the "most likely outcome" of the litigation and the company's "maximum exposure to loss," particularly at the early stages of the proceedings, would not only inundate the market with unreliable, biased speculation, it would undoubtedly cause tension between the company and its counsel. Counsel will naturally want to cover themselves by conducting extensive fact-finding investigations up front, including reviews of e-mails and other electronic discovery (at a potential cost of hundreds of thousands of dollars). Companies, however, may be reluctant to give their counsel access to this information early on in the case, either due to a need to keep legal fees and costs down and/or to minimize the disruption the company's executives. A company would be particularly apt to limit its counsel's investigation if it believes "this is a case that will be settled early." The company's "push back" will make counsel uncomfortable and will create tension in their relationship. Indeed, in certain situations, counsel may become concerned that the company is purposely constraining counsel from ascertaining damaging information that could shape counsel's opinions and statements in connection with the required disclosures.

Also unworkable is the "aggregation" concept contained in the Proposed Amendments. On the one hand, FASB would require specific "qualitative" disclosures as to the company's views about the likely outcome of particular cases, the maximum exposure associated therewith, and the factors and assumptions on which these are based. FASB asserts that these additional "qualitative" disclosures are necessary to give investors more meaningful information. On the other hand, FASB would allow companies to "aggregate" their disclosures by category (e.g.,

Russell G. Golden
August 7, 2008
Page 4

“antitrust matters”). We do not understand how “aggregated” disclosures do not completely eviscerate the specific qualitative disclosures FASB seeks to provide. Moreover, we do not understand how, as a practical matter, a qualitative disclosure can be made on an aggregate basis.

Finally, there is no doubt that the Proposed Amendments will spawn a whole cottage industry of securities fraud lawsuits against companies, their counsel, and auditors every time the opinions disclosed prove inaccurate (which will necessarily occur often). Moreover, since the lawsuits to which these newly filed securities cases will relate will likely still be ongoing, companies will find themselves simultaneously defending the underlying lawsuit and providing discovery to the securities lawsuit plaintiffs. This disclosure to a new group of plaintiffs – who, no doubt, will be coordinating with the original plaintiffs – of the company’s strategies, opinions, and views in connection with the underlying litigation will profoundly prejudice the companies. Thus, not only will companies and their agents be subjected to additional lawsuits, these lawsuits will be strategically brought to gain sensitive, privileged information pertaining to the underlying litigations.

In short, for these and other reasons, we strongly believe that the Proposed Amendments will do far more harm than good, and urge that they not be adopted.

Sincerely,

MCDERMOTT WILL & EMERY LLP



By: John J. Calandra
A Member of the Firm