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August 7, 2008



LETTER OF COMMENT NO. 77

**By email: director@fasb.org**

Technical Director  
Financial Accounting Standards Board  
401 Merritt 7  
P.O. Box 5116  
Norwalk, CT 06856-5116

**Re: File Reference No. 1600-100: Proposed Statement on Disclosure of Certain  
Loss Contingencies**

Dear Sir/Madam:

On behalf of the General Counsels of Viacom Inc., CBS Corporation, News Corporation, Citigroup, Inc., Monsanto Company, Albemarle Corporation, Halliburton Company, United Parcel Service, Inc., Colgate-Palmolive Company, Tyco International Ltd., Raytheon Company, Eastman Kodak Company, The Lubrizol Corporation, The Goodyear Tire & Rubber Company, Comcast Corporation, Intel Corporation, Textron Inc., Cardinal Health, Inc., Ford Motor Company, McDonald's Corporation, Hewlett-Packard Company and Northrop Grumman Corporation, I enclose Comments on the Financial Accounting Standards Board (FASB) exposure draft titled "Disclosure of Certain Loss Contingencies: An Amendment of FASB Statements 5 and 141(R)" (Exposure Draft) (the "Proposed Statement").

As you will see from the enclosed, the above corporations wish to express their collective concern regarding the significant financial and legal detriments to shareholder value that, despite good intentions, would be produced by the Proposed Statement as it proposes to amend FASB Statement No. 5, *Accounting for Contingencies* ("Statement 5") and FASB Statement No. 141 (revised 2007), *Business Combinations* ("Statement 141(R)"). While the corporations share FASB's desire to provide investors with meaningful, timely disclosures regarding contingent liabilities, they have significant concerns regarding the Proposed Statement's approach to disclosure of contingent liabilities, especially disclosures regarding pending litigation. Therefore, the corporations urge FASB not to adopt the proposed amendment to Statement 5 and Statement 141(R).

Financial Accounting Standards Board  
August 7, 2008  
Page 2

Thank you for considering these views on this critical subject. If you have any questions or need additional information, please do not hesitate to contact me.

Respectfully submitted,

  
Stacy S. Ingram  
Partner

enclosure

cc:

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COMMENTS OF

**VIACOM INC.  
CBS CORPORATION  
NEWS CORPORATION  
CITIGROUP, INC.  
MONSANTO COMPANY  
ALBEMARLE CORPORATION  
HALLIBURTON COMPANY  
UNITED PARCEL SERVICE, INC.  
COLGATE-PALMOLIVE COMPANY  
TYCO INTERNATIONAL LTD.  
RAYTHEON COMPANY  
EASTMAN KODAK COMPANY  
THE LUBRIZOL CORPORATION  
THE GOODYEAR TIRE & RUBBER COMPANY  
COMCAST CORPORATION  
INTEL CORPORATION  
TEXTRON INC.  
CARDINAL HEALTH, INC.  
FORD MOTOR COMPANY  
MCDONALD'S CORPORATION  
HEWLETT-PACKARD COMPANY  
NORTHROP GRUMMAN CORPORATION**

REGARDING

**“DISCLOSURE OF CERTAIN LOSS CONTINGENCIES:  
AN AMENDMENT OF FASB STATEMENTS 5 AND 141(R)”  
(EXPOSURE DRAFT)**

August 7, 2008

As discussed more fully below, this paper expresses concern for the significant financial and legal detriments to shareholder value that, despite good intentions, would be produced by the Proposed Statement of Financial Accounting Standards on Disclosure of Certain Loss Contingencies (the “Proposed Statement”), as it proposes to amend FASB Statement No. 5, *Accounting for Contingencies* (“Statement 5”) and FASB Statement No. 141 (revised 2007), *Business Combinations* (“Statement 141(R)”).

Statement 5, as it exists today, provides timely disclosure of loss contingencies produced by the American litigation system.<sup>1</sup> By requiring disclosure of objective facts and of somewhat subjective assessments of potential loss contingencies to the extent they become reasonably estimable, we submit that the current Statement 5 strikes a credible balance. On the other hand, while the Proposed Statement seeks to enhance disclosure, its attempt to superimpose structure and predictability on the inherently volatile and unpredictable litigation process (particularly but not exclusively in the United States) is likely to have the opposite effect. Certainty regarding the potential impact of litigation contingencies is important and already is provided under Statement 5. We respectfully submit that any concerns regarding certainty are driven by the U.S. litigation process and its need for reform and not the disclosure requirements of Statement 5.

Based on the experience of all of our companies in major litigation, the Proposed Statement would risk producing significant negative impacts on shareholder value, including (i) prejudice to a company’s position in litigation and (ii) disclosure that can be both volatile and misleading in content, suggesting a level of reliability that may not be reasonable at that stage. In either case, the disclosure rules could open a company to litigation resulting from the unintended conflict between the disclosure rules and management’s fiduciary obligation to manage the company’s litigation in a competent manner, as well as claims regarding misleading disclosures.

## **I. Current Disclosure Standards for Litigation Loss Contingencies**

Disclosure of loss contingencies under the existing Statement 5 provides adequate information to assist users of financial statements in assessing the likelihood, timing and amount of cash flows associated with pending or threatened litigation. Under Statement 5 today, a loss contingency must be accrued in the financial statements when a loss is *probable* of occurrence and can be reasonably estimated. Even if an accrual is not required, a loss contingency must be disclosed if there is at least a *reasonable possibility* that a loss may be incurred. The disclosure must indicate the nature of the contingency and provide an estimate of the possible loss or range of loss or state that such an estimate cannot be made. Disclosure of the loss contingency in and of itself puts the reader on notice that the contingency could result in a loss that would be *material* – a substantial piece of information. No disclosure is required for a loss contingency that is deemed to be *remote*.

### **A. Summary of United States Litigation System**

To have a better appreciation for the impact of the proposed changes to Statement 5 on a company’s disclosures, the discussion around Statement 5 must be placed in the context of the litigation system in the United States. While the Proposed Statement seeks to engender additional precision in litigation disclosures, an examination of the litigation system in the United States reveals a process that, outside of a predictable set of procedural steps, is anything but precise. In forcing these disclosures, the Proposed Statement, ironically, would create disclosures that are less precise than those presently

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<sup>1</sup> This letter focuses on the impact of the proposed revisions to Statement 5 on the civil litigation process. Nevertheless, the principles discussed herein would be equally applicable to proceedings in administrative, regulatory and criminal contexts, as well as alternative dispute resolution (mediation, arbitration, settlement, etc.).

provided under current Statement 5. Since litigation is inherently a fact-finding process, a company would be required to predict the outcome of the investigatory and fact-finding process based on speculation about facts that may not be knowable until later stages of the process.

The litigation process has an enormous impact on both the availability of reliable information to disclose publicly, as well as the nature of an appropriate disclosure, particularly in its early stages. There is inherent volatility in the process, particularly with respect to the ultimate resolution of a particular claim. Myriad factors, many of which relate little if at all to the underlying facts or merits of the legal claims, nonetheless can significantly impact that resolution. To name but a few:

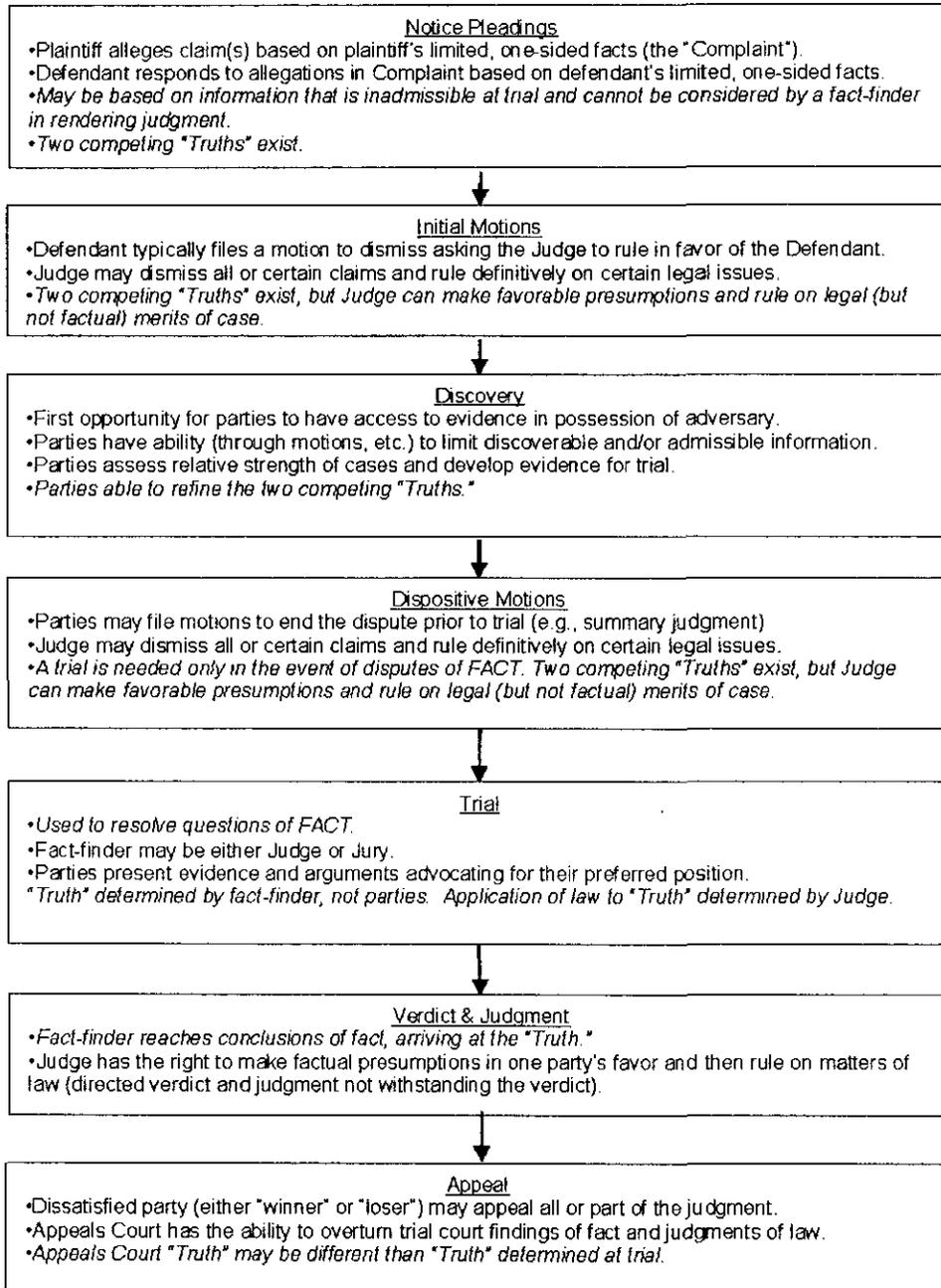
- The interposition of a neutral third party (judge or jury) to resolve the conflict only at a much later stage;
- The skill, biases and availability of the ultimate decision-maker;
- The relative resources and skills of the parties;
- Dismissal of a case based on legal defenses;
- Vague and essentially standardless liability standards that exist in both the common law and the statutes of many states;<sup>2</sup>
- The unpredictable nature of dramatically different available remedies, such as restitution, treble or punitive damages, or injunction, that may evolve during a case;
- Access to evidence to support (or defeat) a claim;
- The substitution of amended or restated pleadings; and
- The fact that many, indeed most, cases are resolved before verdict, frequently on a basis that does not directly mirror the theoretical merits of the claims.

While the volatility of a dispute within the litigation system is significant, the litigation system itself, if allowed by the parties to run its full and normal course (i.e., if the parties do not settle a dispute out of court), follows a largely uniform set of procedures that begin with the filing of a complaint setting forth a plaintiff's allegations and end when the final appeal is exhausted. The below chart sets forth the sequence of events in a "typical" litigation:

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<sup>2</sup> See e.g. CA Bus and Professions Code §17200 (creating cause of action for "unfair competition" defined as any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising...") California courts have interpreted this statute as imposing liability where the challenged practice (1) without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise – whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) is immoral, unethical, oppressive, or unscrupulous; or (3) causes substantial injury to consumers (or competitors or other businessmen). Another test espoused by California courts to determine whether a particular business practice is "unfair" involves an "examination of its impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim – a weighing process." Other states have similarly vague statutes with similarly expansive interpretations. The point is not that claims under such statutes result in substantial liabilities. In practice, frequently they do not. But surely, short of resolution by a court or a settlement, it is nearly impossible to predict the ultimate result under such a standard.

## Litigation -- An Adversarial Process



In reviewing the above diagram, it is important to recognize that particular factual or legal components of a dispute are not resolved until a judge or jury renders a decision, and, in a typical litigation context, the first instance in which a defendant will have relative clarity regarding the potential for a realized, quantifiable loss will be the Verdict and Judgment stage. Disclosure of the procedural posture of material litigation under the current Statement 5 can provide meaningful, verifiable information concerning a litigation. In contrast, the Proposed Statement would create a paradigm shift in the way companies address their quarterly portfolio of litigation by compelling companies to make speculative

disclosures during the most volatile stages of the process. Putting aside the tremendous strain on both internal and external resources that will be required to create these disclosures, companies will be forced, in effect to assume or speculate as to facts before the litigation process generates the information necessary to determine them, creating a significant risk of misleading disclosure and resulting injury to both the disclosing company and investors who rely on the disclosures.

## **B. Current Application of Statement 5**

The current application of Statement 5 reflects the realities of the litigation system by not requiring quantitative disclosure until such time as the possible loss is estimable. Companies frequently find that this estimation only can be made at a stage in the process, sometimes not until after a trial, in which certain legal and factual information has been determined by a fact-finder.<sup>3</sup> If there is a perception that in some instances companies have held back from disclosing litigation loss contingencies that truly are estimable at the pretrial stage, then, we respectfully submit, the proper response is to require better adherence to the current Statement 5, but not to substitute a standard that presents a significant risk of distorting the disclosure process.

The federal antitrust and price discrimination claims filed against Monsanto Company in the mid-1990s provide a good example of the volatility of litigation and a case history that might well have forced unproductive disclosure had the Proposed Statement been in effect by requiring Monsanto to disclose its reliance on an “all or nothing strategy” in defending the suit while also accruing potential, and ultimately unfounded, losses. In its 1996 annual report on Form 10-K, Monsanto disclosed that one of its subsidiaries was a party to various suits alleging federal and state antitrust claims and price discrimination claims. The disclosure included the current procedural standing of the cases and the fact that certain co-defendants in the federal class action suit had settled with the approval of the judge. Antitrust litigation is notoriously complex and antitrust treble damages awards can be very substantial. Furthermore, readers were on notice that over 15 co-defendants had settled for significant amounts. The disclosure included the statement that Monsanto believed that it held meritorious defenses and was “vigorously defending” the lawsuits. Later in the case, Monsanto reached an “all or nothing” gate in the litigation, in which a decision about a certain motion during trial was likely to result in either a substantial treble damages judgment or nothing. In its 1998 annual report on Form 10-K, Monsanto announced that it had received a directed verdict (finding no liability) and that all federal class action claims against it were dismissed.

Companies signing this letter have collectively been involved in numerous similar cases where the outcomes – positive or negative for the company – have been dramatically changed by events that occur during the pendency of a case. For example, discovery often involves review and production of millions of pages of electronic documents, and sometimes critical evidence is not found until the conclusion of the review. Other times, the value of evidence may turn on legal determinations as to whether a particular document is subject to discovery or admissible as evidence. Similarly, an intervening decision of a court in a different litigation can have dramatic effects on the outcome. For example, a recent Supreme Court decision has heightened the pleading requirements for plaintiffs who wish to bring antitrust cases, thereby reducing the exposure to companies in many low probability (but not remote) cases. In any of these situations, a company could be faulted for failure to know the outcome of these disputes, to be aware of the significance of documents that it is in the process of reviewing or to predict the outcome of intervening judicial precedent. Since the proposed rule would require companies to update their estimates on a quarterly basis, the rule could, in effect, accelerate the litigation process itself, at often extraordinary expense.

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<sup>3</sup> There are certain exceptions in which companies have provided a loss estimate earlier in the process, such as when enough diligence has taken place for the defendant to concede liability and the dispute is focused on the stipulated amount of damages in dispute.

In high profile litigation such as in the examples above, companies provide significant disclosure under the current Statement 5 attempting to keep investors aware of the status of current material litigation, and, in compliance with Statement 5, often including accrual of some level of potential damages if appropriate (and particularly if the likelihood of a loss at trial or settlement is likely). Due to the nature of the litigation process, however, companies are frequently unable to provide an accurate quantitative assessment until later in the process.<sup>4</sup>

## **II. The Proposed Statement Will Harm Shareholder Value by Creating Volatile and Misleading Disclosure While Damaging the Positions of Companies In Litigation**

We believe that the expanded disclosure under the Proposed Statement will jeopardize shareholder value by prejudicing a company's position in litigation and requiring the costly disclosure of constantly changing and uncertain information that can both confuse investors and expose the company to the risk of future litigation for allegedly misleading information contained in a premature disclosure.

### **A. The Proposed Disclosure Will Prejudice a Company's Position in Litigation**

The disclosure requirements of the Proposed Statement risk disrupting the adversarial process by requiring companies to divulge litigation strategy and by eliminating the application of attorney-client privilege and work product doctrine in connection with ongoing litigation. These disclosures would likely dictate, or at least impact, the ultimate outcome of litigation.

*The Proposed Statement will require companies to disclose otherwise confidential litigation strategy publicly.*

The qualitative disclosure under the Proposed Statement would require a company in litigation to (a) describe the factors that are likely to affect the ultimate outcome of the litigation along with the potential effect on the outcome; (b) provide a qualitative assessment of the most likely outcome of the litigation; and (c) state the significant assumptions made in estimating the amounts disclosed in the quantitative assessment. Providing this information unbalances the adversarial process by requiring the company to speculate publicly on strategies it will pursue, key issues in the litigation, and weaknesses of the opponent's and its own case.<sup>5</sup> Further, the required disclosures may have the effect of providing a

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<sup>4</sup> It is also possible that the requirement to provide a quantitative assessment is not needed. A study at the University of Michigan by Stephen Farris and A.C. Prichard, "Stock Price Reactions to Securities Fraud Class Actions Under the Private Securities Litigation Reform Act," presents research that – at least as to securities fraud litigation – the stock market reacts significantly to the announcement of the potential claim and the filing of a lawsuit but not to the disposition of litigation. These findings are consistent with the present application of Statement 5 to the litigation system. It is the knowledge of the potential loss and filing of a suit that are key points in the time by providing new information to the marketplace and not the unfolding of the litigation process, which the investing public already understands to have court and jury determinations and other unpredictable variables. This research is available at the Social Science Research Network Electronic Paper Collection, <http://papers.ssm.com/abstracts=288216>.

<sup>5</sup> In this regard, the Proposed Statement's solution of high level aggregation does not remove the potential for adverse disclosures. In most suits against companies, either a single claim or a group of claims (e.g., a class action or series of mass tort claims) will constitute a disproportionate part of the total exposure such that aggregation will not provide an adequate filter for sensitive information. This approach also assumes that it will be clear in any given circumstance which claims should be aggregated, when, in fact, the appropriateness of aggregation often may be unclear -- should aggregation be based on the materiality of underlying claims, type of claim, only where individual disclosure would be prejudicial, or some other metric? Further, to the extent that damage estimates are uncertain, aggregation simply compounds the possibility of error that is inherent in each individual evaluation, leading to a composite disclosure that is so prone to error as to be nearly meaningless.

plaintiff with facts or a theory of recovery that the plaintiff otherwise would not have considered, and which may even become admissions that could be used in the dispute itself.

*The disclosures required by the Proposed Statement jeopardize attorney-client privilege and work product doctrine.*

Disclosure too early in the litigation process also places the attorney-client privilege and work product doctrine (collectively, the “Privilege”) in jeopardy. In complying with the Proposed Statement, companies would need to consult with counsel and experts about the factors required to be disclosed and how they might impact the case. This analysis of factors and their impact, however, directly influences, and is part of, the strategy behind the administration of the case. To then disclose this information would encourage plaintiffs to argue that Privilege has been waived. A key benefit of the Privilege is being able to discuss information with expert counsel to assist the company in developing a strategy to obtain the best possible results, without that information or strategy being available to the other side to use against the company. The proposed disclosure would undo this benefit by providing that information and strategy to the plaintiff.

Separately, independent auditors would assert the need to access the information discussed with, and advice provided by, counsel to assess the disclosures made (particularly the estimates). Providing this information to the auditors would seriously risk waiver of the Privilege. Ironically, the Proposed Statement could create the unwanted effect of a company failing to confide in counsel, with the result that the ability to represent the company is impaired, adversely impacting the company and ultimately the shareholders.

*The quantitative disclosure requirements of the Proposed Statement also will affect the litigation process and outcomes.*

In many, if not most, cases such as mass tort, antitrust, intellectual property or products liability cases, the amount of damages claimed by the plaintiffs usually is not alleged until almost immediately before trial. In fact, in many cases, there are a variety of competing measures to determine the actual damages suffered by a plaintiff and the possibility of awards for subjective pain, future profits, punitive damages or other matters that are difficult to estimate or measure. The requirements of the Proposed Statement could result in plaintiffs choosing to extend the practice of not specifying a damage request, thereby shifting the burden to the company to estimate its liability based on the allegations of the claim. Requiring a company to provide an estimate of maximum exposure also will create a situation in which the company is disclosing facts that underlie possible theories of liability that a plaintiff may not otherwise have, effectively negotiating against itself and establishing a floor for any settlement discussions.<sup>6</sup> This creates an undesirable incentive for the company to lower its estimate to better its negotiating position. In addition, the required disclosures are likely to be viewed (or at least argued) by plaintiffs as containing express or inherent admissions with respect to a variety of matters, including potentially, admission of liability.

#### **B. The Proposed Disclosure Will Result in the Disclosure of Volatile and Misleading Information**

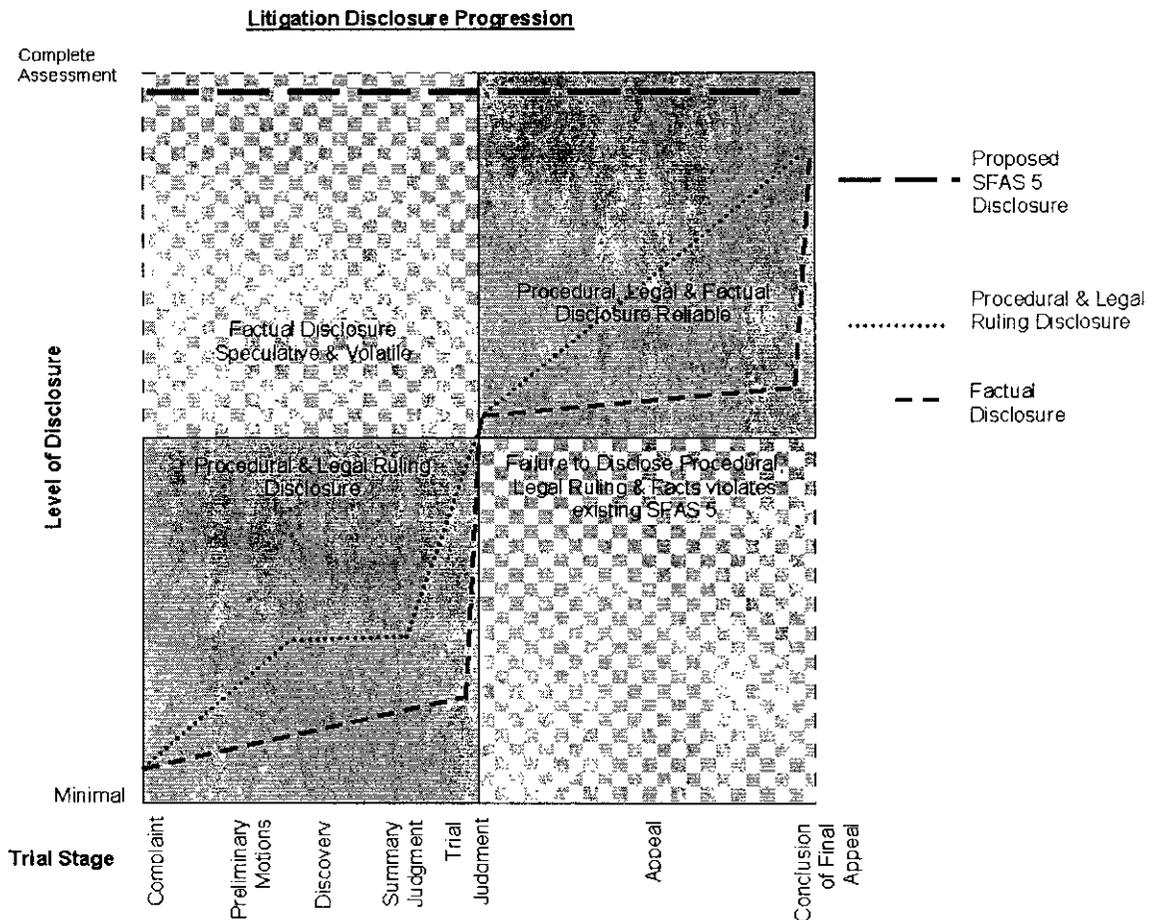
The additional disclosure requirements in the Proposed Statement will lead to volatile and potentially inaccurate disclosure that is contrary to its stated purpose of “assist[ing] users of financial statements in assessing the likelihood, timing, and amount of future cash flows associated with loss contingencies.” We believe the volatile and misleading information may manifest itself in several ways,

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<sup>6</sup> The challenges of this type of quantitative disclosure are magnified in the multi-defendant, joint and several liability context, where the defendant whose disclosure suggests the highest exposure undoubtedly will prejudice its co-defendants by increasing the likely cost of resolution for all other defendants.

including the number of loss contingencies described and the fluctuating nature of the calculations of maximum possible exposure.

As the chart below indicates, the procedural predictability of the trial process makes disclosure of the procedural status of litigation relatively straightforward. The challenge, however, is making appropriate “factual” disclosures regarding the potential merits of a particular claim, including any qualitative or quantitative analysis. The advocacy of conflicting positions that drives the volatility of the litigation process, particularly in its early stages, in most circumstances cannot provide enough factual foundation to assess the likely outcome of a dispute.<sup>7</sup>



The “Proposed SFAS 5 Disclosure” line in the chart highlights the radical nature of the Proposed Statement because the Proposed Statement compels companies to make speculative disclosures during the most volatile stages of the trial process.

<sup>7</sup> In evaluating the chart, however, it is important to acknowledge its limitations. The chart may oversimplify the role that remedies for the alleged harm may play in the disclosure process. For example, the disclosure pattern may be different in a case involving injunctive relief (in a patent dispute, for example), treble or punitive damages, or royalties, and in some instances a plaintiff has the ability to add remedies as the trial progresses, including claims not previously made (e.g., due to new evidence).

*The Proposed Statement will result in substantial additional disclosure of litigation that could overwhelm and obscure otherwise meaningful disclosure for loss contingencies.*

Under the new requirements of the Proposed Statement, a company will be forced to disclose loss contingencies even if they are remote. If final resolution is expected within one year, the Proposed Statement would trigger disclosure of legal proceedings that, on their face, could have the potential to have a severe financial impact on the company, despite the remote likelihood of such a result. Assume, for example, that a company was subject to a complaint alleging that its principal product violated the patent rights of the claimant. Assume also that the company determined the likelihood of loss was remote because it had undergone research before the production of the product and had received memoranda or opinions in support of the company's patent rights. If the company expected that a motion for summary judgment might be filed by a plaintiff within a year, a company would be forced under the Proposed Statement to disclose the claim as a loss contingency. This requirement of disclosing even remote contingencies would result in substantial additional disclosure of litigation that could overwhelm and obscure otherwise meaningful disclosure for loss contingencies. Taking this hypothetical situation an additional step further illustrates this point. If the motion for summary judgment is denied, it is likely that the same litigation would not be required to be disclosed under the Proposed Statement in the next set of financial statements because the company no longer anticipates that it will resolve the claim within one year and the likelihood of a loss remains remote. In addition to other infirmities, this situation would provide plaintiffs with incentives to file motions with a low likelihood of success, in order to enhance their leverage by forcing disclosures prematurely.

*Because litigation is subject to a large number of subjective factors, disclosures too early in the litigation process will require frequent, potentially confusing revisions until a final outcome is reached.*

Most other accounting contingencies are subject to a defined number of valuation factors (interest rate, credit risk, volatility, etc.) that are known, knowable or reasonably estimable. Litigation is subject to a large number of subjective and non-economic factors that makes setting a maximum exposure to loss, even a range of loss, highly speculative. Due to the nature of litigation and the occurrence of interim outcomes during the litigation process (e.g., motions, discovery, appeal), estimates will be in a constant state of flux until final resolution. Even the receipt of a verdict often is not adequate to accurately make a quantitative assessment as the unpredictability of jury findings has been well documented. The recent Exxon case demonstrates the volatility of quantitative disclosure after a verdict but before final resolution through the appeal process. In connection with the 1989 Alaska oil spill, a jury had found Exxon liable for \$5 billion in punitive damages. Upon appeal to the United States Circuit Court, the punitive damages were lowered to \$2.5 billion, only to be furthered lowered to \$500 million dollars by the United States Supreme Court.

Statement 5 currently allows a company to state the possible loss or range of loss when such amounts are reasonably estimable, usually after the company has had the benefit of judicial rulings. Accordingly, the resulting disclosures reflect the knowledge and analysis derived from the progression of the litigation process and are therefore capable of being both meaningful to investors and materially accurate and complete. The Proposed Statement has no such allowance. Companies would be forced, without the benefit of diligence and investigation, and subject to the multitude of potential outcomes outside of their control, to publicly estimate liability, resulting in inaccurate and constantly changing disclosure.

Due to the problems in valuation of estimates at an early stage and the nature of the litigation process, the quantitative and qualitative disclosures required under the Proposed Statement will inevitably be inaccurate, which opens a company to additional risk of litigation. As strategies develop and change over time, depending on how a certain case develops, both procedurally and substantively, companies will

be left open to claims that their prior disclosures contained material omissions and/or were misleading. Furthermore, companies that overestimate the potential impact of a lawsuit only to ultimately prevail and companies that underestimate the potential impact only to be the subject of an unanticipated judgment could face securities liability as the disclosure, which ultimately ends up being inaccurate, impacts purchases and sales of company stock. Finally, companies could face liability to stockholders for disclosure of information that is prejudicial to the outcome of the underlying litigation.

### **C. The Proposed Statement Will Discourage Settlements and Early Resolution of Litigation**

The early resolution of litigation generally is regarded as a favorable outcome. At a minimum, it results in financial statement certainty at a much earlier stage than full litigation through trial and appeals.<sup>8</sup> In addition, settlement discussions are encouraged as a public policy matter.<sup>9</sup> Yet the Proposed Statement, by forcing disclosure of confidential settlement discussions, will discourage efforts to resolve cases before trial and is inconsistent with this expressed policy of Congress and the federal courts. For example, in settlement conversations, parties often discuss the relative strengths and weaknesses of their case and any proposed settlement figures incorporate, by their nature, relative confidence levels regarding the merits of the dispute. These assessments may be highly prejudicial if they should become known to the judge or jury who will be making factual and legal determinations during the case for many of the reasons discussed above. As a practical matter, the Proposed Statement's requirement to disclose qualitative and quantitative information regarding settlement information will have the effect of discouraging companies from settlement.

### **III. Conclusion**

We believe that Statement 5, as currently drafted, provides adequate information to assist the users of financial statements in understanding litigation loss contingencies. Statement 5 works in tandem with the vagarious nature of our litigation system by only requiring the type and timing of information for loss contingencies involving litigation that can be provided in a reasonably accurate manner. We believe that the timing and type of disclosure required by the Proposed Statement will result in less clear and less meaningful disclosure that could also be harmful to company and investor interests. The key differences between the Statements can be found in Annex A for your reference.

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<sup>8</sup> Indeed, the securities markets typically have a favorable reaction to the certainty brought about by early resolution or settlement of claims. For example, on July 26, 2000, Xerox disclosed that its earnings for the second quarter 2000 would be below analyst's estimates and that it was cooperating with an SEC investigation of accounting irregularities. These disclosures caused Xerox's stock price to decline 16 percent from \$18.19 per share to \$15.25 per share. Later in 2000, a securities fraud lawsuit was filed on behalf of investors who bought Xerox stock and bonds between February 17, 1998, and June 27, 2002, alleging accounting fraud that overstated Xerox's profits by almost \$3 billion. On March 27, 2008, Xerox reported it would pay \$670 million to settle the securities lawsuit, without admitting wrongdoing. On the announcement of the settlement, Xerox stock rose \$0.13 to close at \$14.97 in New York Stock Exchange composite trading. Up to the point of the announcement, Xerox stock price declined 7.5 percent during 2008. On April 2, four trading days after the announcement, Xerox stock closed at \$15.36. In addition, upon the announcement of the settlement, Standard & Poor's placed Xerox's BBB- rating under credit watch with positive implications, saying the settlement removes a "material financial uncertainty." Fitch's maintained its BBB rating and stable outlook.

<sup>9</sup> The Advisory Committee's Note to Federal Rules of Evidence Rule 408 provides: "As a matter of general agreement, evidence of an offer to compromise a claim is not receivable in evidence as an admission of, as the case may be, the validity or invalidity of the claim... [E]xclusion may be based on two grounds... (2) a more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes." FED. R. EVID. 408 advisory committee's note.

It is the company's responsibility to defend shareholder value in litigation. Companies will not be able to fulfill this responsibility without the benefit of an assessment of the merits of a legal proceeding, the opportunity to privately strategize and negotiate with the assistance of counsel and the ability to engage in confidential settlement conversations. This ability would be compromised by the Proposed Statement.

Rather than a need for new and additional requirements, greater efforts should be focused on ensuring that the current requirements under existing Statement 5 are applied. We would urge the FASB to ascertain whether any disclosure problems exist today and to conduct a study to gather additional data before proceeding further with this matter. We certainly would welcome the opportunity to cooperate with such a study in any way deemed helpful.

**APPENDIX A**

CURRENT STATEMENT NO. 5	PROPOSED STATEMENT NO. 5
<b><i>Disclosure of Loss Contingency</i></b>	<b><i>Disclosure of Loss Contingency</i></b>
<p><u>Triggering Event</u></p> <p>If no accrual is made, disclosure is required if there is at least a <b><i>reasonable possibility</i></b> that a loss may have been incurred.<sup>10</sup></p>	<p><u>Triggering Event</u></p> <p>Disclose <b><i>all</i></b> loss contingencies, unless the likelihood of a loss is <b><i>remote</i></b>.<sup>11</sup></p> <p>Even if <b><i>remote</i></b>, disclosure is required if the contingency:</p> <ul style="list-style-type: none"> <li>• Is expected to be resolved within one year; and</li> <li>• Could have a severe impact on the company's financial position, cash flows, or results of operations.</li> </ul>
<p><u>Required Disclosure</u></p> <p>(a) The nature of the contingency.</p> <p>Companies generally include the following information in their description of the nature of the contingency:</p> <ul style="list-style-type: none"> <li>• How it arose;</li> <li>• Its legal or contractual basis;</li> <li>• Its current status; and</li> <li>• The anticipated timing of its resolution.</li> </ul>	<p><u>Required Disclosure</u></p> <p>(a) Qualitative information.</p> <p>Include general information from current SFAS 5 disclosure plus:</p> <ul style="list-style-type: none"> <li>• A description of the factors that are likely to affect the ultimate outcome of the contingency along with their potential effect on the outcome;</li> <li>• A qualitative assessment of the most likely outcome of the contingency; and</li> <li>• The significant assumptions made in estimating the amounts disclosed in the quantitative assessment.</li> </ul>
<p>(b) Estimate of the possible loss or range of loss or statement that such an estimate cannot be made.</p>	<p>(b) Quantitative information (includes amounts recognized in the financial statements).</p> <ul style="list-style-type: none"> <li>• The amount of the claim; or</li> <li>• If there is no claim, the company's best estimate of the maximum exposure to loss.</li> </ul> <p>If the amounts above would not be representative of the actual exposure, a company may disclose its best estimate of the possible loss or range of loss.</p>
<p>No comparable requirement.</p>	<p>(c) Qualitative and quantitative description of the terms of relevant insurance or indemnification arrangements covering the possible loss.</p>

<sup>10</sup> No disclosure is required for unasserted claims, unless: (a) it is ***probable*** that a claim will be asserted, and (b) there is a ***reasonable possibility*** of an unfavorable outcome.

<sup>11</sup> No disclosure is required for unasserted claims, unless: (a) it is ***probable*** that a claim will be asserted, and (b) the likelihood of a loss is ***more than remote***.

CURRENT STATEMENT No. 5	PROPOSED STATEMENT No. 5
No comparable requirement.	<p>(d) Tabular reconciliation of total amount of loss contingencies recognized at the beginning and end of the period.<sup>12</sup></p> <p>Include a qualitative description of the significant activity in the reconciliation and disclose the line items in the financial statements where the recognized loss contingencies are included.</p> <p>Disclose the total amount of recoveries from insurance or indemnification agreements recognized in each financial statement that are related to the loss contingencies included in the table.</p>
No comparable exemption.	<p><u>Disclosure Exemption</u></p> <p>Allows aggregation of information about loss contingencies at a higher level than by the nature of the contingency if prejudicial to the company's position.</p> <p>In rare instances, the prejudicial information may be omitted altogether if it is still prejudicial after aggregation. Disclosure that the information has been omitted and the reason why is required.</p> <p>The following information must always be disclosed:</p> <ul style="list-style-type: none"> <li>• the amount of the claim (or, if there is no claim, an estimate of the maximum exposure to loss);</li> <li>• a description of the loss contingency (including how it arose, its legal or contractual basis, its current status, and the anticipated timing of its resolution); and</li> <li>• a description of the factors that are likely to affect the ultimate outcome of the contingency along with the potential impact on the outcome.</li> </ul>

<sup>12</sup> The reconciliation shall include: (i) increases recognized during the period; (ii) increases resulting from changes in estimates of the amounts of loss contingencies previously recognized; (iii) Decreases resulting from changes in estimates or derecognition of loss contingencies previously recognized; and (iv) Decreases resulting from cash payments or settlements.