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August 8, 2008



LETTER OF COMMENT NO. 220

Technical Director 401 Merritt 7 P.O. Box 5116 Norwalk, CT 06856-5116

Re: Proposed Standard 1600-100, Disclosure of Certain Loss Contingencies (June 5, 2008).

Dear Technical Director:

The Financial Accounting Standards Board ("FASB") recently released a proposed standard regarding the Disclosure of Certain Loss Contingencies ("Proposed Standard") and invited feedback on the proposal. McAfee Inc. believes the Proposed Standard requires the disclosure of privileged attorney work product information that will significantly undermine its ability to formulate and execute strategies designed to mitigate legal exposure.

A. THE LEGAL SYSTEM IS DEPENDANT UPON THE ABSOLUTE CONFIDENTIALITY OF AN ATTORNEY'S OPINIONS AND ANALYSIS.

The work-product doctrine protects the mental processes of an attorney by providing a privileged area in which a case can be prepared and analyzed.¹ In doing so, the privilege promotes the adversary system by preventing one party from piggy-backing on an adversary's preparation.²

The United States Supreme Court has acknowledged the work-product privilege is "essential to an orderly working of our legal procedure." The Court therefore promulgated a rule *requiring* courts to "protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's

¹ U.S. v. Nobles, 422 U.S. 225 (1975).

² U.S. v. Adlman, 68 F.3d 1495 (2nd Cir. 1995); see also Shields v. Strum, Ruger & Co., 864 F.2d 379 (5th Cir. 1989).

³ Hickman v. Taylor, 329 U.S. 495 (1947).

B. THE PROPOSED STANDARD REQUIRES THE DISCLOSURE OF CRITICAL COMPONENTS OF AN ENTITY'S LEGAL EVALUATION AND STRATEGY.

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The Proposed Standard directs companies to report qualitative and quantitative assessments of ongoing and contingent litigation. These assessments include the exact information the work product privilege was designed to protect.

1. Quantitative Information

Under the Proposed Standard, entities must describe the amount of the claim against the entity. While the Board correctly notes that an amount is typically available in court documents, disclosure of this information is of little accounting value and is extremely prejudicial to the disclosing entity. In virtually every case, the damages asserted by the plaintiff are highly inflated. As such, any financial analysis based on this information would be inaccurate at best. To correct the misinformation under the Proposed Standard, an entity is forced to reveal a central component of its legal strategy and attorney work product.

The application of an attorney's opinions, legal theories and conclusions culminates in determining the entity's maximum exposure in a given case. This information typically drives the entire legal strategy as an entity decides how to litigate the matter, whether to settle and for how much. Mandating the disclosure of such privileged information would devastate a company's ability to achieve a fair result by providing opposing counsel with a key insight into the company's case.

2. Qualitative Information

The Proposed Standard also calls for the publication of a company's qualitative case assessment. Companies are asked to provide an analysis of each contingency, including: (1) significant assumptions made in deriving the quantitative analysis; (2) factors likely to affect the ultimate outcome; and (3) the entity's assessment of the most likely outcome. The Board asserts these disclosures will assist users of financial statements in making their own assessments about the likelihood of future events related to the loss contingency.

⁴ FED. R. CIV. P. 26(3)(B).

⁵ Model Rules of Professional Conduct 1.6

⁶ See, e.g., Upjohn Co. v. U.S., 449 U.S. 383 (1981); Baker v. Gen. Motors Corp., 209 F.3d 1051 (8th Cir 2000).

⁷ Proposed Standard 1600-100, ¶ 7(a)(1).

⁸ Proposed Standard 1600-100, Appendix ¶ A15.

⁹ Proposed Standard 1600-100, ¶ 7(b).

¹⁰ Proposed Standard 1600-100, Appendix ¶ A18.

Unfortunately, it will also assist opposing counsel by revealing critical strategic information about the entity's legal position.

The work product doctrine exists for the sole purpose of preventing such

disclosures. Analysis of the factors impacting the ultimate outcome of litigation is the preeminent role of an attorney. The legal system is designed to provide both sides with equal access to the facts of a particular dispute. But the work product privilege ensures that each side performs their own analysis to identify pivotal facts and determine their likely impact on the case. Thus, requiring an entity to

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C. THE PREJUDICIAL EXEMPTION DOES NOT PREVENT THE DISCLOSURE OF PRIVILEGED INFORMATION.

publish its analysis would severely prejudice an entity's ability to defend itself.

To address the detrimental effects of the above disclosures, the Proposed Standard includes two levels of exemption from reporting prejudicial information – neither of which fully protects attorney work product. The primary exemption allows an entity to aggregate the disclosures at a level higher than individual contingencies. When publication of the aggregate is prejudicial, an entity is exempt from disclosing the harmful information. At first glance, these exemptions appear to provide adequate protection for privileged information. But the Proposed Standard includes an exception that practically eliminates the entire exemption.

The final clause of the proposed exemption requires disclosure of the privileged information it is designed to protect. The clause states that under, "no circumstances may an entity forgo...providing a description of the factors that are likely to affect the ultimate outcome of the contingency along with the potential impact on the outcome." Entities are also asked to disclose the anticipated timing of the resolution. As detailed above, allowing an opposing party access to this information would undermine the legal process and devastate an entity's ability to adequately defend itself.

¹¹ See e.g., U.S. v. Nobles, 422 U.S. 225, 238 (1975); In re Steinhardt Partners, L.P., 9 F.3d 230 (2nd Cir. 1993); Westinghouse Elec. Corp. v. Repub. Of Philippines, 951 F.2d 1414 (3rd Cir. 1991).

¹² Proposed Standard 1600-100, ¶ 11.

¹³ *Id*.

¹⁴ Id.

¹⁵ *Id*.

In conclusion, compliance with the Proposed Standard will cause an entity irreparable harm by requiring the disclosure of the privileged information that drives litigation strategy and defense. McAfee therefore respectfully requests that the Board reject the Proposed Standard.

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Sincerely,

Mark Cochran

EVP and General Counsel

McAfee, Inc.