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LETTER OF COMMENT NO. 221

August 8, 2008

Mr. Robert H. Herz
Chairman
Financial Accounting Standards Board
401 Merritt 7
PO Box 5116
Norwalk, CT 06856-5116

Re: File Reference No. 1600-100 – Proposed Statement of Financial Accounting Standards – Disclosure of Certain Loss Contingencies, an amendment of FASB Statements No. 5 and 141(R)

Dear Mr. Herz:

Nationwide Insurance Group appreciates the opportunity to comment on the Exposure Draft of the Proposed Statement of Financial Accounting Standards, *Disclosure of Certain Loss Contingencies, an amendment of FASB Statements No. 5 and 141(R)* (Exposure Draft or Proposed Standard). Nationwide Insurance Group (Nationwide) is comprised of three affiliated mutual insurance companies and their subsidiaries under common management. Nationwide Financial Services, Inc. is a Securities and Exchange Commission registrant, in which Nationwide has majority equity and voting interests. Nationwide is one of the largest diversified insurance and financial services organizations in the world, with more than $161 billion in assets and annual revenues of $22 billion.

While we agree with the Board as to the importance of the transparency, timeliness and usefulness of financial information that is disclosed, we disagree that the Proposed Standard is necessary to achieve this goal. The current FASB Statement No. 5, *Accounting for Contingencies* (SFAS 5) is sufficient to meet this goal. The Exposure Draft model would subject the reporting entities to too many unintended adverse consequences and would result in the disclosure of potentially misleading information to investors. Herein we outline our main concerns with the Proposed Standard.

QUANTITATIVE DISCLOSURE

The Board has proposed that entities disclose the *amount of the claim or assessment against the entity,* or if this is not applicable *the entity's best estimate of the maximum exposure to loss.* Both potential requirements are problematic from a legal contingency perspective.

Neither alternative bears a relationship to the company's ultimate loss, if any. The *amount of the claim* is often speculative and far reaching. To disclose this amount could lead users to believe the company may have to pay these amounts, which typically does not happen. The *amount of the claim* often is not set out in a complaint and thus is not publicly available, thus the second requirement, *entity's best estimate of the maximum exposure to loss*, is expected to be more often used. Given the nature of legal contingencies, this information is likely to be speculative and imprecise and could result in volatile disclosures as circumstances change with the progress of the legal proceedings. Any significant deviation from the company's estimate of maximum exposure could subject the company to more liability for making a materially false or misleading statement.

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The disclosure of the *entity's best estimate of the maximum exposure to loss* provides information to the plaintiff about the company's perception of its exposure. The plaintiff can view the disclosure as a starting point in negotiations and can use this information to more aggressively value its case, resulting in increased loss to existing shareholders. Moreover, the maximum loss estimate would have to be adjusted as key developments unfold in the case, which would provide a roadmap to plaintiff's counsel of the company's assessment of the strengths and weaknesses of the case. This requirement could be highly prejudicial even with the proposed prejudicial exemption (see the "Prejudicial Exemption" section below for discussion on this topic).

Finally, the alternative that the company *estimate the maximum exposure* will require disclosure of Attorney Work Product, raising fundamental due process issues as this could result in a waiver of the attorney-client privilege which could then result in the underlying information being subject to discovery.

TABULAR RECONCILIATION

The Proposed Standard requires the company to "*perform a tabular reconciliation*," which includes disclosure of accruals, changes in accruals and settlements paid. There are several concerns with this requirement. First, requiring public disclosure of accruals could provide plaintiff's counsel with the exact amount the company has put aside to pay particular litigation. The Board's Prejudicial Exemption does not alleviate these concerns (see the "Prejudicial Exemption" section below for further discussion). This could help a plaintiff's counsel to determine the value of a case they should pursue. Second, this information is not useful to the financial statement users. Aggregating unique liabilities does not provide a historic pattern that would be a reliable glimpse into the future because they would lack homogeneity and a comparable basis. Third, the requirement that the company disclose the amounts accrued will require disclosure of Attorney Work Product which could result in a waiver of the attorney-client privilege.

PREJUDICIAL EXEMPTION

The Proposed Standard includes *exemptions for prejudicial information*. This exemption is deemed by the Board to be a compromise between the interests of the entity and financial statement users. We disagree that this exemption is a viable compromise.

First, the *ability to aggregate the enhanced disclosures* is an illusory shield. There is no apparent ability to shield the underlying non-aggregated information from the reach of discovery. Unless there is federal legislation compelling states to say that disclosing the amounts is not a waiver of privilege and precluding the plaintiff from using the numbers and inquiring about the basis for their determination, then any disclosure (aggregated or unaggregated) could be prejudicial. As the option to *aggregate the information* continues to be prejudicial, the second option to *omit disclosures* would be necessary more often than the "rare" use that the Board expects.

Second, a careful tracking of the periodic changes in the tabular reconciliation aggregation can give prejudicial information to the plaintiffs. For example, if the aggregated loss reserve at the end of the second quarter is $25 million and the aggregated loss at the end of the third quarter is $35 million, the plaintiff's counsel in one class action could conclude that the court's denial of the company's motion for summary judgment has caused the company to add $10 million to its loss reserve. That information, in turn, will provide the plaintiff's attorney with an advantage in settlement negotiations.

EXPECTED INSURANCE RECOVERIES/INDEMNIFICATIONS

Current SFAS 5 language addresses the disclosure of gain contingencies by stating, "*care shall be exercised to avoid misleading implications as to the likelihood of realization.*" The Exposure Draft requires the disclosure of "*relevant insurance or indemnification arrangements that could lead to a recovery of some or all of the possible loss*". To require disclosure of insurance recoveries/ indemnifications may mislead investors into thinking the likelihood of realization is close to certain which is contradictory to the SFAS 5 logical language.

From a litigation perspective, insurance carriers typically will not have moved beyond a reservation of rights letter until the litigation is substantively resolved. Disclosing the amount would imply confirmation of coverage, which may not be the case. Additionally, disclosure of an expected recovery in cases where the company is denying liability creates a contradictory statement. Third, as with any other quantified disclosures, this will require disclosure of Attorney Work Product which could result in a waiver of the attorney-client privilege. Such disclosure would provide valuable information to plaintiff's counsel, who then can use the company's expected recovery as a floor in attempting to negotiate a litigation settlement.

DISCLOSURE THRESHOLD

The Board notes in the Exposure Draft, "*The at least reasonably possible threshold for disclosing loss contingencies has not resulted in the disclosure of the full population of an entity's existing loss contingencies that would be of interest to financial statement users.*" Accordingly, the threshold for disclosure is proposed to be lowered to *more than remote* for most contingencies and even further to *remote for those contingencies expected to be resolved in the near term and that could have a severe impact on the entity.* We do not feel the threshold for disclosure needs to be decreased to these levels.

SFAS 5 paragraph 3 defines *reasonably possible* as, "*the chance of the future event or events occurring is more than remote but less than likely*" and *remote* as, "*the chance of the future event or events occurring is slight.*" We note that the FASB definition of *reasonably possible* already allows for the disclosure of items that are more than remote; however, the complaints outlined by the Board imply they feel entities' judgment results in disclosures from only the higher end of the range. By changing the language to remove the concept of *reasonably possible*, the Board is requiring ALL items greater than remote to be disclosed without giving consideration to judgment. We are not overly offended by this change; however, we feel it useful to note that this is counter-productive in the movement towards principles-based standards that support the use of judgment. We are more troubled by the requirement to disclose loss contingencies regardless of the likelihood of loss, if the contingencies are expected to be resolved in the near term and the contingencies could have a severe impact.

Statement of Financial Accounting Concepts No. 2, *Qualitative Characteristics of Accounting Information* states in paragraph 95:

> Conservatism is a prudent reaction to uncertainty to try to ensure that uncertainties and risks inherent in business situations are adequately considered. Thus, if two estimates of amounts to be received or paid in the future are about equally likely, conservatism dictates using the less optimistic estimate; however, if two amounts are not equally likely, conservatism does not necessarily dictate using the more pessimistic amount rather than the more likely one…

The concepts presented within this quotation can be used to consider the disclosure of loss contingencies. As this statement notes, "*if two amounts are not equally likely, conservatism does not necessarily dictate using the more pessimistic amount rather than the more likely one.*" To analogize to the disclosure of loss contingencies, the Exposure Draft suggests a threshold of *remote for contingencies expected to be severe and resolved in the near term.* If required to disclose these amounts, the entity would be asked to be overly conservative and disclose the less likely scenario. This disclosure is misleading to financial statement users, as it presents a distorted view of an entity's liquidity, working capital, and financial position. As a result, financial statement users cannot distinguish between those items that are likely to occur and those that are not likely to materialize and may make faulty financial decisions.

CONCLUSION

In its efforts to provide investors with more information, the Proposed Standard overreaches. The result will be entities' disclosure of excessive, unreliable, even misleading, information. Investors will be inundated with information about *remote* contingencies and *maximum exposure to loss*, will have a skewed perception of a company's exposure and will be making investment decisions based on this misleading picture. The Board has substituted the perceived problem of investors receiving insufficient information with the bigger problem of investors receiving misleading information. Furthermore, the disclosure of this information could be prejudicial to the entity, even with the Board's prejudicial exemption. The disclosure of prejudicial information could potentially harm entities financially, which in turn would harm investors.

We hope these comments assist the Board during its redeliberations of the Proposed Standard. In the event that any Board or FASB staff member would like any further clarification of our positions we are happy to explain them in greater detail.

Respectfully,

Martha L. Frye
Senior Vice President and Chief Accounting Officer
Nationwide Insurance