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VIA E-MAIL (director@fasb.org)

LETTER OF COMMENT NO. 233

Mr. Robert H. Herz
Chairman
Financial Accounting Standards Board
401 Merritt 7
P.O. Box 5116
Norwalk, Connecticut 06856-5116

Re: File Reference No. 1600-100; Exposure Draft – Proposed Statement of Financial Accounting Standards (Disclosure of Certain Loss Contingencies)

Ladies and Gentlemen:

We are writing this letter in response to the request of the Financial Accounting Standards Board ("FASB") for comments on its exposure draft relating to disclosure of certain loss contingencies (File Reference No. 1600-100).

Summary of Our Position

While we understand and appreciate that some users of financial information have told FASB that they are not receiving adequate information to assist them in assessing the likelihood, timing and amount of future cash flows associated with loss contingencies, we believe the proposed revisions are unnecessary. On the whole, we believe the FAS 5 standard has worked well, and that what may be needed is more attention to the implementation of the standard rather than its reinvention.

Under the Exposure Draft, the additional information that companies would be required to provide would be highly uncertain and unreliable. We believe that, overall, the provision of such information is likely to be far more useful to a company's adversaries than to the intended users of its financial information. In fact, investors are very likely to prefer that a company not impair its ability to defend against litigation by making the disclosures called for in the proposal. These same investors are likely to object to the stock price volatility that could arise from the disclosure of the highly uncertain and unreliable information called for by the proposal. We note also that different users of

financial information may have different and potentially conflicting expectations concerning what the loss contingency disclosure should provide. Therefore, we urge FASB to carefully consider the interests of all users of financial information, including those that the disclosure rules are intended to benefit, before proceeding with an amendment to the Statement.

We also encourage FASB to balance the benefits of additional disclosure with the increased costs of providing such disclosure. These costs include not only the time and expense of the analytical work associated with providing the additional information, but also the cost of confusion to investors that such information is likely to create. The costs should be considered against the backdrop of uncertainty, in our view, as to whether users of financial information are actually interested in the kind and volume of information that the new standard would elicit.

Finally, by compelling companies and their officers to make highly uncertain quantitative estimates that ultimately may turn out to be inaccurate – without the protections of the statutory safe harbors that have been added to the federal securities laws by the Private Securities Litigation Reform Act of 1995 – the proposed Statement would unfairly and improperly subject those companies and their management to a heightened risk of government enforcement and/or shareholder action. Moreover, those senior officers who must certify to the accuracy and completeness of the financial statements included in annual reports on Form 10-K and quarterly reports on Form 10-Q personally could be exposed to a greater risk of governmental enforcement action if the Statement were adopted as proposed.

General Issues with the Proposed Statement

The Statement Fails to Meet the Project's Stated Objective

In response to your Question 1, we believe that the proposed Statement does not meet the project's stated objective of "providing enhanced disclosures about loss contingencies so that the benefits of those disclosures justify the incremental costs." While we understand that the benefit FASB intends to reap from the proposed Statement is to have more robust disclosures at an earlier juncture, the costs and unintended consequences of the proposal are excessive. Requiring companies to enhance the quantitative and qualitative disclosure about loss contingences even where the litigation is at such an early stage that it is not capable of accurate estimation will not enhance the disclosure currently provided to users – such disclosures will simply provide extremely speculative information that may vary greatly from one quarter to the next and have little to no actual value. Further, where the claimant has not put forth a claim or assessment amount, we believe that forcing a company to disclose "its best estimate of the maximum exposure to loss" could result in additional litigation against the company if such early estimates turn out, in hindsight, to be inaccurate. The proposed measure could also encourage predatory litigants who could attempt to

impact company financial statements through the timing of their lawsuits and the damages they demand. In addition, disclosure of a company's maximum exposure is likely to hurt its settlement position by, in effect, asking the company to negotiate against itself by providing a plaintiff with the company's valuation estimate. Finally, much of the information that the proposed Statement would require a company to disclose has traditionally been the very information that companies strive to keep confidential through the attorney-client privilege and the attorney work-product protections.

Costs Would Greatly Increase Under the Proposed Statement

The proposed Statement has the potential to greatly increase costs to companies, both with respect to the preparation of financial information and, in addition, by potentially changing the outcome of litigation. Companies would need to pay for expertise in developing and evaluating the best estimate of its maximum exposure for each loss contingency. Litigation is not scientific and developing reasonable estimates for claims regardless of how far along they are in the litigation process is likely to be extremely difficult. Further, there could be additional liability imposed on companies if the estimates prove to be incorrect, as the Private Securities Litigation Reform Act does not extend forward-looking statement safe harbor protection to these litigation contingency items.

Disclosure of Remote Contingencies

Currently, a company must disclose a loss contingency if there is at least a reasonable possibility that a loss may have been incurred. The proposed Statement contemplates disclosure of all loss contingencies unless a company has (a) made an assessment and (b) determined that the likelihood of a loss is remote. In practice, there will be many instances in which it is too early in the process for a company to make an assessment of the probability of loss and, therefore, the company would be unable to conclude that the likelihood of a loss is remote. Under the proposed Statement, the fact that such an assessment is premature would trigger a requirement that the loss contingency be disclosed. Therefore, the proposed Statement would result in disclosure of many loss contingencies that may be immaterial and for which a company does not have adequate information to accurately assess the risk of loss. We believe that this is not the type of information that the vast majority of users of financial information would find particularly useful due to its inherently speculative and highly inaccurate nature. We believe that this type of "soft" information not only will be of little utility to users of financial statements, but in fact ultimately could be harmful to them as investors because of the questionable reliability of *management 'guesses' that would be compelled in respect of an actual or potential lawsuit.* Aside from its prejudicial nature, the sheer volume of information prescribed by the proposed Statement in some cases could overwhelm users of financial statements and obscure more meaningful disclosures in the financial statements.

Disclosure of Loss Contingencies Expected to be Resolved in the Short Term

In response to your Question 3, we have significant reservations with a flat rule that would require disclosures about any loss contingency if the resolution of the contingency is expected to occur within one year of the date of the financial statements and the loss contingency could have a severe impact on the company's financial position, cash flows or results of operations. Specifically, we believe the proposal is inappropriate where a company has determined that the likelihood of a loss is remote. Why, in those circumstances, should management be required to spend time quantifying the claim? We believe that disclosure of loss contingencies without regard to likelihood of loss results in excessive and not particularly valuable disclosures that would not assist investors in truly evaluating the status of the company from a financial and investment perspective. The only beneficiaries of such disclosure would be the adversaries to the company in the specific matter, not the Company's investors.

In this regard, we note that the FASB's proposed standard would call for disclosure of information that ordinarily would not be disclosable pursuant to the core concept of "materiality" that underpins the federal securities laws. The U.S. Supreme Court has made clear that, with respect to contingent or speculative information or events, a determination of materiality necessarily must focus on what the reasonable investor would consider important and depends on a balancing of both the probability that the contingency will occur and its anticipated magnitude. See *Basic, Inc. v. Levinson*, 485 U.S. 238 (1988). There are many situations in which companies and their counsel, in applying this concept, have concluded that a particular event -- if sufficiently remote -- would not be material for purposes of the federal securities laws, even if it potentially would have a severe adverse impact if it were to be realized. We believe that superimposing an artificial one-year limitation on this legal materiality analysis in the case of remote but potentially severe contingencies would be unwarranted and potentially highly prejudicial to public companies and their investors.

Question 3 also addresses disclosure of unasserted claims. The proposal is particularly problematic in those circumstances in which the potential claimant has not evidenced any awareness of the claim. The disclosure would call attention to expiring statutes of limitation and to claims that might have some nuisance settlement value even if they have a low probability of success. The disclosure could also be used against the company as an admission of liability. Ultimately, this type of disclosure would be contrary to the adversarial litigation system that exists in the United States.

We strongly disagree with the proposed Statement requiring disclosure of remote loss contingencies. If FASB nonetheless decides to retain this requirement, we appreciate that the standard for disclosure of such loss contingencies that is contemplated by the proposal is higher than materiality. We believe that a materiality standard for the

disclosure of remote loss contingencies is too low and, if FASB keeps this requirement, we urge FASB to maintain the higher standard contained in the proposed Statement.

Quantitative Disclosure

The exposure draft states that “[o]ne of financial statement users’ most significant concerns about disclosures under Statement 5’s requirements is that the disclosures rarely include quantitative information. Rather, entities often state that the possible loss cannot be estimated.” We believe that, in many cases, companies find that there is not a reasonable basis for estimating the possible loss. We are concerned that FASB may have drafted the proposed Statement in response to the concerns of only one set of users of financial information. Rather than revise the standard based on this unilateral perspective, we urge FASB to collect further information from both users and preparers of financial information before adopting a dramatic change to the existing disclosure requirements.

In response to your Question 4(a), we do not believe that the proposed Statement would result in an improvement in the reporting of quantitative information about loss contingencies. More information does not necessarily mean improved disclosure, especially if the added information is speculative, as would be required by the proposed Statement. In our experience, companies generally make a good faith effort to comply with the requirements of FAS 5 by undertaking a rigorous analysis of the claims against the company as part of its quarterly and annual reporting procedures. Thus, a company statement that the possible loss cannot be estimated is generally based on a company’s reasoned analysis. Although we generally do not have an issue with a company being required to disclose the amount of the claim or assessment against the company, we are concerned that in many cases the plaintiff’s claim is not based on an actual loss and is purely speculative. Oftentimes, a large number is included in the claim as a ploy to gain media and corporate attention. This trend would be further encouraged by the proposed Statement. We therefore question whether this type of disclosure would be useful to users of financial information. Further, where the plaintiff has not quantified its claim, we are concerned that the litigation may be at such a preliminary stage (such as before discovery) that the company is unable to provide an estimate of the maximum exposure to loss that has any reasonable basis. The proposed requirement would force a company to come up with its “best estimate”, whether or not it has adequate information on which an estimate can be reasonably based. In that instance, using the term “best” to describe the mandated estimate may be misleading; the best disclosure may be for a company to apprise investors of the existence of the claim and to advise them that it is unable to make a reasonable estimate of its maximum exposure.

Disclosure of Possible Loss or Range of Loss

In response to your Question 4(b), we do not believe that the company should be required to disclose the possible loss or range of loss, including when the plaintiff has

quantified its claim. As proposed in the Statement, a company should have discretion to add such additional information if it believes that disclosure of such a range would enhance the already required disclosure.

We agree that users of financial information have a need for useful and reliable financial information. The current standard requires companies to give an estimate of the loss or range of loss, or state that such an estimate cannot be made. In response to your Question 4(c), we strongly believe that this standard should be maintained – if the loss cannot be estimated, then forcing a company to provide an estimate would not result in useful and reliable disclosure. As these estimates are likely to change from quarter to quarter, a company may subject itself to litigation based on the accuracy of the required disclosure itself. We question whether users of financial information would find it useful to base investment and other decisions on disclosures containing inherently unreliable estimates.

By compelling a company's officers to make quantitative estimates even when those officers do not believe such estimates are ascertainable, the proposed Statement would expose such officers, and their companies, to the risk of liability based on what they believe are estimates without reasonable basis. Furthermore, such highly uncertain quantitative estimates are likely to impair a company's ability to defend against litigation and contribute to stock price volatility, thereby hurting actual investors (who are themselves important users of financial information).

Disclosure of Maximum Exposure to Loss

In response to your Question 5, regardless of whether the loss contingency has a specific claim amount, a company may be unable to provide a reliable estimate of the maximum exposure to loss that is meaningful to users. Often, the specific claim amount does not accurately reflect the true value of the loss contingency and, therefore, has little to do with a company's estimate of its true exposure. Provision of a company's estimate of maximum exposure has the potential to significantly and adversely affect the Company in that such an estimate would provide the plaintiff with previously privileged information that would negatively impact the Company in any settlement negotiations.

Tabular Reconciliation

In response to your Question 12, the tabular reconciliation called for in the proposal poses many of the same issues presented by the other quantitative and qualitative aspects of the proposal. We believe that a tabular reconciliation in the footnotes that specifies changes in accruals for loss contingencies on a quarterly basis is not necessary. This should only be required annually. If an accrual changes significantly from the prior quarter, a company would disclose that in the narrative description of the loss contingency in the quarterly report.

Qualitative Disclosure

The proposed Statement requires disclosure of “a description of the factors that are likely to affect the ultimate outcome of the contingency along with their potential effect on the outcome; the company’s qualitative assessment of the most likely outcome of the contingency; and significant assumptions made by the company in estimating the amounts disclosed in [the quantitative assessment] and in assessing the most likely outcome.” It is likely that these required disclosures would involve waiver of attorney work-product immunity or attorney-client privileged communications, a result that is both unreasonable and inappropriate, particularly as it would invariably prejudice the company’s litigation position and thus harm investors.

Disclosure of Settlement Offers

In response to your Question 6, we believe that requiring disclosure of settlement offers between counterparties would be extremely detrimental to companies. In some cases, a company may choose to use the amount that it would be willing to offer in settlement as its reasonable estimate of the minimum loss contingency. We understand that a formal settlement offer often represents the value a company attributes to the compromise of the litigation, rather than the value of the claim itself. When such an offer is made, however, it is usually identified as such and distinguished from informal discussions between parties that test willingness to compromise. Disclosing these informal discussions would hamper productive settlement activity, particularly if the disclosure mandate was used by plaintiffs to put company positions into the public domain. Further, as recognized by the Board, settlement offers often expire quickly and may not reflect the status of negotiations only a short time later.

Exemption from Disclosing Prejudicial Information

In response to your Questions 8 and 9, the limited exemption from disclosing prejudicial information that is included in the proposed Statement is not workable. For many companies, and in particular smaller public companies, there may be a small enough number of claims that would need to be disclosed that the claims would be discernible even if aggregated. Coupled with the requirement of written disclosure describing the claims themselves, readers would likely be able to easily differentiate the aggregated amounts, allowing a company’s litigation opponents to use such information to implement manipulative litigation tactics. In addition, the potential losses that pose the greatest risk to a company are likely to be of a different nature than the rest of the contingencies (i.e., securities fraud matters, privacy and data security breaches or employment class actions compared to products liability or tort matters) and will therefore be incapable of aggregation. Where the company determines that it may forego such disclosure altogether because it would be prejudicial to its position, it must still disclose the reason why the information has not been disclosed. We do not understand what FASB expects in response to this requirement, other than a statement

that the information would be prejudicial to the company. Further, the proposed Statement still requires disclosure of a description of the factors that are likely to affect the ultimate outcome of the contingency, even though this information itself is likely to be prejudicial to a company's position.

In response to your Question 11, we agree with the definition of prejudicial information and our primary concerns with the proposed Statement originate from the fact that much, if not all, of the proposed quantitative and qualitative disclosure is likely to fall into the definition of "prejudicial information."

Insurance and Indemnification

The proposed Statement would require a description of the terms of relevant insurance or indemnification arrangements, including any caps, limitations or deductibles. This information could be difficult for companies to ascertain, especially during the early stages of litigation. Coverage is often subject to negotiation with the carrier and such a description could be prejudicial to a company's position and could lead to greater volatility in coverage and rates. Further, it is likely to result in disclosure of a company's analysis and strategy relating to specific contingencies that could negatively impact the company's ability to recover. Moreover, companies are usually ill-advised to make disclosure about insurance given the uncertainty of claims coverage. The required disclosure would almost certainly trigger risk factor disclosure as to the various ways in which claims may be denied or delayed, which would also be prejudicial to the company's position. *We are unclear as to the benefits of creating an expectation of coverage which in itself would trigger the need for further disclosure to dispel that expectation.*

Timing of Implementation of New Standard

In response to your Question 14, if the proposed Statement is adopted, we strongly urge a longer transition period. For many companies that have a calendar fiscal year, it will not be feasible to implement the proposed Statement with respect to the Form 10-K for the year ended December 31, 2008. Many of the loss contingencies that would require quantitative disclosure under the proposed Statement may not have been adequately valued by the company under the proposed Statement because they had been categorized as "less than reasonably possible" under the previous FAS 5 standard. Companies will need a considerable amount of time to obtain case valuations for each and every case, to consider the need to hire independent advisors to value the potential exposure, and to analyze the likelihood that a case could be resolved within the next 12 months. Following the completion of such valuations, a company would need to apply exceedingly careful consideration to drafting the proposed disclosures to take into consideration issues of attorney-client privilege, attorney work-product, and impact on litigation strategy. Finally, each company would need to carefully consider its auditor's request for information related to such valuations

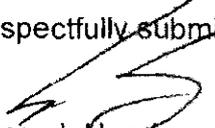
IFRS

We are not prepared at this time to comment on whether we believe that convergence of US GAAP and International Financial Reporting Standards is appropriate. However, assuming for purposes of this letter that such convergence is forthcoming, we believe such convergence is likely to raise specific issues with respect to the disclosure of loss contingencies. Many of the countries currently using IFRS have dramatically different litigation systems than the system used in the United States. We also understand that IFRS may be considering changes to its current rules requiring disclosure of loss contingencies. Therefore, the possible convergence of accounting standards only highlights the questionable nature and timing of the proposed Statement because it would require companies to evaluate claims under the proposed Statement for a short period of time and later adopt new IFRS standards, which may materially differ from the proposed Statement.

Conclusion

We have serious concerns about the proposed Statement, and the impact it would have on their businesses and litigation. We strongly encourage FASB to reconsider its proposal and to carefully weigh what we view as substantial costs against the marginal benefits of information that is highly speculative and unreliable. We further urge FASB to carefully consider the interests of all users of financial information, especially a company's investors, before adopting amendments to the Standard.

Respectfully submitted,



Henry J. Hood