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August 8, 2008

LETTER OF COMMENT NO. 16

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Sir David Tweedy
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Re: Disclosure of Certain Loss Contingencies – an amendment of FASB Statements No. 5 and 141(R) – File Reference No. 1600-100

Gentlemen:

The Association of Corporate Counsel (“ACC”) appreciates the opportunity to present its views on the June 5, 2008 draft known as the “Disclosure of Certain Loss Contingencies – an amendment of FASB Statements No. 5 and 141(R)” which we will refer to as the proposed amendments. ACC is addressing these comments to the IASB as well, because we believe these issues are to equal concern to them. The proposed amendments dramatically alter the disclosure requirements of certain loss contingencies in current FASB 5 (“FAS 5”), including lawsuits. In our view, and the view of our membership, the quality of the information that would result from the proposed amendments would not warrant the harm that they would inflict on companies and their shareholders.

ACC is a bar association serving and representing attorneys within the in-house legal departments of corporations and private sector organizations worldwide. ACC has over 24,000 members employed by over 10,000 organizations across 77 countries. Of particular relevance here, ACC is a recognized leader in protecting and preserving the attorney-client privilege rights of the many companies and organizations represented by our members.¹ In addition, our membership brings to these important issues the unique views of in-house counsel who are often at the intersection of the outside lawyers, auditors and executive management in both the disclosure and litigation function. As such, our membership speaks not only for in-house counsel, but also for the interests of their client organizations and the shareholders, members and owners who will be impacted by the proposed amendments. Because the proposed amendments would damage the companies ACC members represent, they necessarily injure those who have invested in these companies – a principal constituency that FASB seeks to protect.

ACC’s membership has followed closely the proposed amendments to FAS 5, which has governed for decades the disclosure of litigation-related loss contingencies in corporate financial statements. The proposed amendments have generated a greater response from our membership, in a shorter period of time, than any other single issue within memory. Indeed, an unprecedented

¹ See, e.g., ACC’s amicus briefs before the courts (US and abroad) seeking protection of privilege in the corporate context, our advocacy in redressing the “culture of waiver” promulgated by cooperation standards issued by governmental prosecutorial and enforcement policies and guidelines, ACC’s Blue Ribbon Task Force of leading Chief Legal Officers and Auditors (with the participation of the Center for Audit Quality), addressing increased and disturbing trends toward waiver of privilege in the audit context, and our extensive educational and resource materials on this subject: all are available online at <http://www.acc.com/php/cms/index.php?id=84>.

number of members have been actively involved in commenting on this letter. Without exception, our members and their clients have expressed profound opposition to the proposed amendments. A representative selection of those members join me in signing this letter.

ACC benefits from the assistance of Professor Daniel R. Fischel and Mr. John K. Villa in the preparation of this submission. Professor Fischel is a professor of law and business at Northwestern University Law School and the Kellogg School of Management, and a professor emeritus of law and business and the former dean of the University of Chicago Law School. He is also the Chairman and President of Compass Lexecon, one of the world's leading economic consulting firms.² Mr. Villa is a partner at Williams & Connolly LLP, as well as an adjunct professor of law at Georgetown University Law School and the author of several legal treatises. He has written and spoken widely on the issues raised by the proposed amendments and has litigated many of the most prominent securities cases of our era, including the *Enron* case. His practice focuses on the duties and responsibilities of corporate fiduciaries, including inside and outside counsel. Professor Fischel and Mr. Villa volunteered their time to address the difficulties posed by the proposed amendments.

ACC respectfully requests an opportunity for Professor Fischel, Mr. Villa, and/or another ACC representative to present the views of ACC on this matter before the Board at an upcoming public roundtable meeting.

Executive Summary of ACC's Position

The proposed amendments to FASB Statements No. 5 and 141(R), as applied to litigation-related contingencies, fail the key test for a standards change because the grave problems they create far outweigh any doubtful benefit that may accrue. The proposed amendments are a "solution" in search of a problem. There is no systemic failure that warrants the proposed change. Investors are not suffering from inadequate disclosure of litigation-related loss contingencies in financial statements. Both the recent and the historical problems that affected some companies result not from misperception of litigation-related loss contingencies, but rather from more fundamental issues such as the valuation of assets and the impact of financial engineering. To the limited extent that the risk in material litigation can be quantified, there is a substantial group of analysts who monitor such litigation and provide sophisticated analysis that quickly is reflected in the stock values. The analysis available to investors from this objective cadre of observers provides adequate insight into the risks of litigation. Proposals seeking greater precision are not feasible given the nature of the risks involved.

Even if the disclosure of litigation-related loss contingencies were a serious systemic problem, it is extremely doubtful that compelling companies and their lawyers to quantify litigation risks would yield more accurate financial statements. As every trial lawyer knows, litigation anywhere in the world — but especially in American courts and before American juries— inherently is unpredictable. The reaction of a single juror or the impact of a single ruling can have a dramatic and unanticipated impact. Indeed, it is highly doubtful that any company or lawyer who ever lost a billion-dollar case *expected* that result -- they were presumably surprised

² Professor Fischel has been cited often by the Supreme Court in its leading securities decisions. See *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 169, 184, 191 (1994); *Basic, Inc. v. Levinson*, 485 U.S. 224, 247 n.24 (1988); and *Edgar v. MITE Corp.*, 457 U.S. 624, 643-44 (1982).

by the extent of the negative outcome. Had they expected to lose or to lose so badly, they surely would have settled. In this instance, requiring the losing lawyer or company to have produced a more precise description of the outcome would not have provided more accurate disclosure to investors. In short, the case has not been made for change.

Forcing the extensive and detailed disclosures mandated by the proposed amendments in a far broader range of cases than FAS 5 now requires will cause serious harm to the disclosing companies and their shareholders. The proposed disclosures create a substantial risk of waiver of the attorney-client privilege and work-product immunity, with catastrophic consequences to the corporation. Confidential legal advice, lawyer thought processes, and legal analysis disclosed in public filings allow an adversary in litigation to essentially review the files and strategies of the company's defense counsel. This would inflict serious damage on the company and its shareholders. Opposing parties easily can leverage such information to extract higher settlements or otherwise disadvantage the corporation.

Underestimating a large loss will be painted as a professional failure laid at the feet of lawyers who are forced to provide concrete estimates about remote and undeveloped matters. Bad numbers could also create new potential liability for the company whose stakeholders relied on mistaken estimates. To avoid these failures, the natural tendency for those responsible for estimates may be to err on the side of caution, resulting in safe (i.e., high) estimates and thus inflated loss reserves. The company's stock price will reflect those unnecessarily high loss reserves and the safe estimate will become a self-fulfilling prophecy: the well-advised corporation will settle for that figure rather than risk a greater loss at verdict or judgment, even if the odds of an unfavorable verdict or judgment are low. Thus, the pressures generated by the evaluation and disclosure process may themselves impact negatively the outcome of the litigation (or more likely settlement) – a variant of the "observer effect."

Finally, as we explain below, under the new rule, the financial statement consequences of a suit with huge potential losses, albeit a low likelihood of prevailing, will inflict immediate injury on the company and its shareholders. A sophisticated plaintiff may be able to exploit that problem by threatening a suit and then withdrawing it in exchange for an unjustified and extortionate settlement.

The many harms caused by the proposed amendments by requiring disclosure in the broad range of cases where it would not currently be required by FAS 5 are not accompanied by any appreciable benefits. Requiring companies to quantify litigation risks and to share detailed privileged information regarding claims against them will not yield more accurate financial statements than those available under the current rules.

Investors Are Not in Need of the Required Information Concerning Litigation-Related Loss Contingencies.

The proposed amendments assume that there is a problem that can be remedied by expanded disclosures of loss contingency information; in fact no problem exists. Perhaps the best measure of whether the current FAS 5 regime has been successful is the paucity of litigation resulting from loss contingency disclosures of litigation claims pursuant to FAS 5. Our review of the publicly available FAS 5 proceedings fails to show demonstrable evidence of a serious problem.

This is consistent with recent economic history: the problems that have plagued companies are not a function of misperceived litigation-related loss contingencies but rather of more fundamental issues such as the valuation of assets and the impact of financial engineering. Some level of understanding of material litigation risk is of course important but that role is already served by a sophisticated corps of analysts who follow and evaluate major corporate litigation; because of their research, knowledgeable assessments of major litigation already exist.³ (Minor litigation is not tracked because it is not material.) By using publicly available historical information on settlements, analysts independently estimate costs to resolve pending or potential litigation.⁴ Other analysts research and publish reports on litigation trends affecting companies with massive tort exposure involving tobacco, asbestos, lead paint, or other products.

Rating agency Standard & Poor's publishes a detailed guide to evaluating litigation risk and how it affects credit ratings.⁵ And market participants include hedge funds or "litigation arbs" who invest or advise their clients to invest based on their evaluation of special situations.⁶ All of this extensive activity confirms that the market already incorporates non-privileged information regarding claims or prospective claims into share prices; a corporation and its counsel can add nothing to this evaluation apart from privileged information. Any compelled quantification, necessarily speculative, will be vested with greater meaning than is warranted, and is more likely to distort the market's assessment of a claim than to improve it.

No doubt, some unexpected results will occur—but that is because litigation is unpredictable by nature. Juries and judges often reach surprising and unanticipated results. Experienced trial lawyers may differ dramatically as to the expected result of a particular case—if everyone agreed on the value of a claim, there would be nothing to litigate. Any quantification of expected loss therefore suffers from the fact that most outcomes cannot be predicted with precision and may vary based on a single judicial ruling or the views of one juror.

The unpredictability of jury verdicts is well-known. Two recent high-profile cases serve to show that even federal appellate rulings may have dramatic and unanticipated impacts. First, within the past month, the US Supreme Court drastically reduced the punitive damages arising out of a 1989 Alaska oil spill. The jury had awarded \$5 billion in punitive damages. The United States Court of Appeals for the Ninth Circuit cut that amount in half. The US Supreme Court then reduced the award to \$500 million; had one Justice not owned Exxon stock and recused himself,

³ For examples of litigation analysis, see, e.g., Elizabeth Albanese, *Analysts: Lawsuits Unlikely to Affect Tobacco Bond Deals*, *The Bond Buyer*, March 26, 2003; Elizabeth Albanese, *Analysts: Successful Anti-MSA Suit Could Spur News Laws*, *The Bond Buyer*, Oct. 3, 2005, at 31; *Lead Pigment Litigation Clouds Some Chemical Sector Ratings*, *Standard & Poor's*, May 21, 2007; Sally Roberts, *Blumenthal lawsuit won't roil industry*, *Business Insurance*, Jan. 31, 2005 (discussing industry-wide effect of lawsuit alleging secret payments in the insurance industry).

⁴ See, e.g., Carlos Marquez, *Settlement of class action lawsuits could cost Doral \$125 million*, *Caribbean Business*, Nov. 30, 2006, at 8.

⁵ *How Litigation Risk Affects Corporate Ratings*, *Standard & Poor's*, Nov. 28, 2005.

⁶ For example, *Goldman Sachs Hedge Fund Partners LLC Form 10-Q* (Sept. 30, 2004) disclosed that "litigation situations . . . provided good opportunities for GED Advisors." As another example, ING Investment Management Hedge Funds use "Event Driven" strategies that center on investing in securities of companies facing major corporate events, such as significant litigation.

punitive damages might have been eliminated entirely. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 1183 (2008).

Second, last year, the United States Court of Appeals for the Fifth Circuit effectively terminated the Enron securities litigation, ending as a practical matter the threat of huge damages against the litigating defendants after others had paid enormous amounts to settle. After Enron filed for bankruptcy in December 2001, a wave of litigation engulfed many who did business with the company. Some defendants settled for amounts totaling \$7.2 billion; other defendants refused to settle. On appeal, two of the three judges of the Fifth Circuit voted to reverse as a matter of law the district court's certification of the shareholder class while one judge suggested that the class might be appropriate. The reversal effectively foreclosed significant damages from the remaining defendants. *Regents of the Univ. of Calif. v. Credit Suisse First Boston, Inc.*, 482 F.3d 372, 376-77 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1120 (2008). Had one of the two judges who voted for reversal voted differently, the case might have proceeded as a huge class action and the non-settling defendants might have faced tremendous financial exposure.

In both *Exxon* and *Enron*, as in most litigation, knowledgeable parties and their counsel obviously had dramatically conflicting views regarding the expected outcome—otherwise, they would have settled. Because of the inherent unpredictability of litigation outcomes, the proposed requirements mandating more quantification will not produce financial statements any more accurate than those produced under the current rules.

The Proposed Changes Jeopardize the Attorney-Client and Work Product Protection of Attorneys' Work, and Thus, Will Harm Companies and Their Shareholders.

The attorney-client privilege is the oldest privilege recognized at common law. The purpose of the privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Of nearly equal importance, particularly to the in-house lawyer, is the work product immunity that protects from adversaries her analysis and mental impressions of litigation and potential litigation. *Hickman v. Taylor*, 329 U.S. 495 (1947).

The proposed amendments require the disclosure of several categories of information including a description of the contingency, how it arose, its legal or contractual basis, its current status, the “anticipated timing of its resolution,” a “description of the factors likely to affect the ultimate outcome,” a “qualitative assessment of the most likely outcome for the contingency,” and “significant assumptions made by the entity in estimating the amounts disclosed.” These disclosures will be based on confidential information provided at least in part by the company's in-house lawyers and trial counsel. Once a company discloses this information, even to an independent auditor, the company faces a greater risk that a court later will deem these disclosures to have waived the attorney-client privilege. If the auditor demands to review the underlying legal analysis to sign off on the disclosure, this further increases the likelihood of the lawyers' work being disclosed to the company's adversaries, as happened in *Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113 (SDNY 2002), or *In re Stone & Webster, Inc., The Shaw Group Inc., and Ernst & Young LLP*, No. 05-0552 (Texas S.Ct. 2005), or the more recent *U.S. v.*

Textron, Inc., No. 06-198T (US District Court of Rhode Island August 29, 2007). (ACC filed amicus briefs in both the *Textron* and *Stone & Webster* cases.)

Of particular concern to in-house counsel is the potential and impact of the waiver of the work-product immunity which ordinarily protects materials prepared by an attorney in anticipation of litigation. The attorney-client privilege protects communications between attorney and client, while the related attorney work product doctrine shields from production materials which disclose the attorney's theory or strategy regarding anticipated or pending litigation. The potential effect of the proposed amendments on the work-product doctrine is perhaps even more problematic for in-house counsel than the proposed amendment's potential to erode the larger attorney-client privilege. Much of the most sensitive work of in-house counsel lies in the evaluation and formulation of judgments about legal matters that would – under the proposed amendments – be included in a company's financial statements. If the in-house counsel is required to “bake” her analysis into the disclosure process contemplated by the proposed amendments, then the auditor is provided with an entry into the mental impressions or analysis of the lawyer, and the protections traditionally accorded to the lawyer's thought processes and case development vanish if deemed a waiver by the courts – again with the calamitous result of revealing the company's legal work to its adversaries.

Indeed, an unanticipated effect of the proposed amendments could be that management will be incented to exclude lawyers from fully engaging on sensitive matters to avoid risks of waiver that the lawyer's required disclosure would create. Thus, ACC argues that the proposed amendments will likely have the unintended outcome of chilling full and frank discussions between companies and their counsel, to the detriment of corporate clients. And, of course, waiver of the privileges protecting such information from adversaries would be catastrophic.

The Proposed Amendments Will Reveal Trial Strategies and Disadvantage Companies in Settlement Negotiations.

The information required to be disclosed under the proposed amendments often will reveal key aspects of litigation strategy, since the company will be obliged to reveal its “qualitative assessment of the most likely outcome,” the “anticipated timing of [the claim's] resolution,” and the “significant assumptions” made by the company in estimating the amounts disclosed. And because underestimating a large loss will be professionally embarrassing for those providing the estimate, and could even result in claims against them, those individuals naturally may err on the side of caution, offering high estimates which would translate into inflated loss reserves. This will cause friction between corporations and their counsel, and present serious conflicts that will be time-consuming, disruptive and expensive for the corporate client.

There can be little doubt that the additional required disclosures inevitably will both impact and impair a company's settlement posture. The disclosures will serve as a settlement floor—since the corporation itself valued the claim at that amount, a plaintiff will refuse to accept anything less. Once the company values the claim, that liability instantly will be reflected in the stock valuation. The company will risk severe adverse market reaction if it chooses to proceed to trial on the claim and suffers a significantly worse outcome. All factors point toward the initial valuation as determinative in fixing, as a practical matter, the ultimate outcome of the settlement process—yet such valuations are done at an early point in the pre-litigation process when little may be known. This “observer effect” in which the process of evaluation itself impacts or

determines the event observed, is neither desirable as a matter of disclosure policy nor beneficial to the company or its shareholders.

Indeed, even a baseless claim could prove damaging to the company under the proposed amendments if wielded by a plaintiff asserting a large but weak claim. It may be months or years before defense counsel can gather the information necessary and enter a courtroom to refute such a claim. Until that occurs, the company may be required to include the large claim in footnote disclosures in its financial statements, in tabular reconciliations and possibly in other reports, which would depress the stock price. Thus, the simple threat of a claim could be sufficient for a sophisticated plaintiff to extract unwarranted settlement dollars by threatening a large claim and offering to settle it quickly.

On the other hand, a company may possess information that a claim against it is strong, perhaps stronger than the plaintiff suspects. The company's adversary may not possess this information. Since the financial statement disclosures mandated by the proposed revisions must reflect a candid assessment of the claim by the corporation and, in all likelihood, its counsel, the mandated disclosures will provide a road map to opposing counsel regarding how to extract the maximum amount in settlement. If the opposing party cannot obtain settlement on these terms, the disclosures will still encourage counsel to pursue a claim to verdict. In other words, sophisticated plaintiffs' counsel will be able to use effectively, to the disadvantage of a disclosing corporation and its shareholders, any information contained in the expanded disclosures.

The Proposed Disclosures Will Fuel Litigation.

Not only will these expanded disclosures compromise the litigation of existing claims, but they threaten to spark claims of their own. When some disclosures, attempting to quantify fundamentally unpredictable outcomes, inevitably prove inaccurate, new claimants will emerge and will seize upon the mistaken disclosures as a basis for liability. And by compelling the disclosure of significant detail regarding the circumstances of the claim, the factors that may affect the result, the most likely outcome, and the anticipated timing for resolution, the proposed revisions invite Monday morning quarterbacking. Parties who purport to have relied upon these litigation disclosures and predictions will use them as the basis for claims of their own. Defending against such claims may require a wholesale waiver of the attorney-client privilege and work product doctrine with respect to the disclosed claim that brought about the misrepresentation claim; otherwise, the defending corporation will be pressed to show that its disclosures were reasonable.

The Board's Exemptions Fail to Mitigate These Concerns.

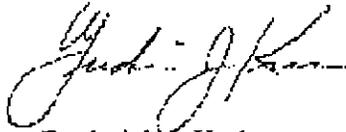
The proposed amendments recognize that for certain loss contingencies, such as threatened or pending litigation, disclosure of certain information may be prejudicial to the company's litigation position. In those circumstances, the proposed rules allow a company to disclose an estimate or range of possible loss, to aggregate disclosures or, in "rare instances," to omit the disclosures altogether. As we have pointed out, a realistic assessment of the practicalities of litigation shows that the "rare instance" exception applies in nearly every case. Aggregating data will not solve that problem; sophisticated plaintiffs' counsel can isolate and identify anomalies and certainly can make educated guesses as to the source and reason for a surprising aggregation.

Conclusion

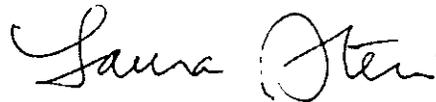
FAS 5 has balanced the interests of disclosure and privilege for more than thirty years. The proposed amendments would do far more harm than good, and address "concerns" from which no one suffers. We urge the Board to decline the proposed amendments.

The following in-house counsel co-sign this letter in support of these comments; please recognize that given the breadth of issues and diversity of interests they represent, they may not agree with every point as stated, but wish the FASB to understand how strongly they share the general concerns expressed.

Very truly yours,



Frederick J. Krebs
President



Laura Stein
Chair

cc: SEC Commissioners Chairman Cox
Commissioner Atkins
Commissioner Casey
Commissioner Walter

The following companies (including several who signed on after the initial filing date, but prior to the August 8, 2008 comment deadline) sign this letter to show their support. Please recognize that given the breadth of issues and diversity of interests they represent, not every company may agree with every point as stated, but all wish for the FASB and IASB to understand how strongly they share the general concerns expressed.

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