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Via e-mail

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Dear Members of Financial Accounting Standards Board:

Re: *File Reference No. 1840-100*

Business Roundtable appreciates the opportunity to comment on the Exposure Draft: *Disclosure of Certain Loss Contingencies* (the ED).

Business Roundtable is an association of chief executive officers of leading U.S. companies with nearly \$6 trillion in annual revenues and more than 12 million employees. Member companies comprise nearly one third of the total value of the U.S. stock markets and pay more than 60 percent of all corporate income taxes paid to the federal government. Annually, they pay more than \$167 billion in dividends to shareholders and the economy.

Business Roundtable companies give more than \$7 billion each year in combined charitable contributions, representing nearly 60 percent of total corporate giving. They are technology innovation leaders, with more than \$111 billion in annual research and development spending – nearly half of all total R&D spending.

Business Roundtable members strongly support efforts to improve the transparency and consistency of reported financial information. We applaud the Financial Accounting Standards Board's efforts to assure that investors and other users of financial statements are provided with timely, accurate, meaningful and reliable information. However, we do not believe the proposed standard set forth in the ED is an appropriate way to do that. As a threshold matter, we believe that the existing standard governing disclosures of loss contingencies (formerly FAS No. 5, recodified as ASC Section 450.20) effectively balances the interests of preparers, investors and other users of financial information.

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Preparers, attorneys and auditors have a long history of operating under the standard. We also believe that the perceived problems by some constituencies with that standard may reflect problems in implementation rather than with the standard and could be dealt with through the issuance of more guidance by the FASB.

We also appreciate that the ED is significantly improved over the first exposure draft relating to accounting for contingencies released by the FASB in June 2008. Nonetheless, several aspects of the ED remain of significant concern. In particular, the draft takes too little account of the nature of the American legal system and may cause serious harm to preparers and their investors. Our specific comments illustrate that concern. Our answers to the questions posed by the FASB in the ED are contained in our specific comments.

The Requirement to Disclose Certain Remote Contingencies

The proposed requirement to disclose contingencies that could involve a “potential severe impact” on the preparer (Section 450-20-50-1D), even if the likelihood of such a result is deemed remote, raises several problems. This requirement involves a significant departure from practice under the current standard, where preparers treat remote contingencies as definitionally immaterial. As such, it effectively changes the definition of materiality. Such a change could have broad ramifications for other types of disclosures, including disclosures not included in the financial statements, and there is no evidence the current definition of materiality does not work well.

The proposed standard also will require burdensome and expensive compliance efforts, particularly for large companies. Business Roundtable companies face a large number of lawsuits as part of their normal business activities. Some of these cases are frivolous, but contain very large damages demands, including demands for punitive damages. While the chance of an ultimate material loss from such a claim is remote, the proposed standard will require preparers to analyze each such case carefully, looking at many factors, such as whether a jury trial is demanded, the law in the jurisdiction governing compensatory and punitive damages, the identity and experience of the opposing counsel, and a host of other factors in order to assess whether the case could have a “potential severe impact” on the company. This analysis will be costly, time consuming and the resulting answer will inevitably be highly speculative. Moreover, the proposed standard will prompt plaintiffs’ lawyers to increase their damages claims, hoping that the preparer’s concerns about disclosing the matter, even if the likelihood of severe loss is believed to be remote, may prompt an early settlement.

The speculative nature of these disclosures also casts doubt on their usefulness. Users of the financial statements may well be confused or unnecessarily alarmed, rather than enlightened, by disclosures of outcomes that are not only remote but also highly uncertain. Indeed, disclosures of remote loss contingencies may obscure the more meaningful disclosures of probable losses. If the goal of the proposed standard is to improve the transparency and usefulness of contingent loss disclosures, this part of the proposal works against that objective.

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Finally, the proposed standard may create a new source of potential liability for preparers if events prove the possible loss disclosed or the decision not to disclose the contingency to be wrong. Disclosures in financial statements are specifically excluded from the safe harbor for forward looking statements contained in the Private Securities Litigation Reform Act of 1995 (PSLRA). If the preparer does disclose the remote contingency but its estimate of the impact of the contingency turns out to be wrong, the protection for forward looking statements in the PSLRA will not be available to protect the preparer because the disclosure is in the financial statements, even though it involves a forward looking and speculative estimate. If the preparer does not disclose a remote contingency, concluding that it would not have a potential severe impact, but ultimately the contingency leads to such a loss, plaintiffs' attorneys may claim that the preparer was reckless in failing to disclose the possibility of the loss much earlier. For these reasons, we urge the FASB to eliminate the requirement that remote contingencies be disclosed from any final standard.

The Requirement to Assess the Materiality of Contingencies without Regard to Possible Recoveries

The ED (Section 450-20-50-1F) requires preparers to assess the materiality of loss contingencies to determine whether disclosure is required without regard to insurance or other indemnification arrangements. This is a significant change from current practice where preparers take expected insurance or other recoveries into account when assessing materiality of claims. Some industries such as the health insurance and consumer product industries face large numbers of claims from beneficiaries or consumers as a routine part of their business. Such claims are often covered by extensive third party or self insurance arrangements, the costs of which are disclosed in the financial statements. For some claims, the proposed standard threatens to create the anomalous result that, in order for the disclosure to be complete, the potential uninsured loss will be disclosed but the preparer also will disclose that it has insurance to cover all or enough of the claim that any resulting loss is likely to be immaterial. In the absence of a coverage dispute with the insurer, we fail to see how such a disclosure provides any useful information to the users of the financial statement. It will, however, increase compliance costs and clutter the financial statements with information of dubious value. Moreover, because many of these claims are not filed in the same jurisdiction and have widely varying impacts with respect to future cash outflows, they will not meet the ED's requirements for aggregation of claims.

Accordingly, we urge the FASB to drop the requirement that materiality be assessed without regard to possible recoveries from any final standard. In the alternative, preparers should be able to consider sources of recovery in assessing materiality unless the source of the potential recovery has denied liability.

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Enhanced Quantitative and Qualitative Disclosures

The proposed enhanced qualitative and quantitative disclosures required under the ED also raise several serious problems for financial statement preparers. Moreover, we do not believe that many of the proposed disclosures provide real benefit to users of the financial information, especially when considered in light of their potential adverse impact on preparers.

Requirement to Disclose Individual Loss Accruals

The ED requires preparers to provide, for all contingencies that are at least reasonably possible, quantitative disclosure of “the possible loss or range of loss and the amount accrued, if any” if such amounts are estimable. For such items where an amount has been accrued for a possible loss, for example in connection with an individual lawsuit, this means that the individual accrual will have to be disclosed in the discussion of that contingency.

The proposal involves a significant departure from the current standard in which disclosure of specific accruals is only required where “necessary for the financial statements not to be misleading.” Most preparers do not disclose individual accruals even when they have accrued such amounts with respect to a material contingency that is disclosed in the financial statements. There are several reasons for this practice.

First, even where the possible loss or range of losses is a material amount requiring disclosure, the amount of the loss deemed probable by the preparer and therefore actually accrued may be much smaller and individually immaterial to the financial statements. Heretofore such amounts have not usually been disclosed; under the proposed standard, such amounts will have to be disclosed.

Second, disclosure of specific accruals is usually not done because it gives plaintiffs in litigation a window into the preparer’s thought processes about the probable outcome of pending litigation. Requiring disclosure of such amounts may cause preparers serious harm by requiring the disclosure of confidential assessments of probable outcomes, making resolution of the matters more difficult. It would put a floor under any settlement discussions and may alter the course of the litigation in other respects as well.

We urge the FASB to retain the current requirement that individual accruals only be disclosed “in certain circumstances” where “necessary for the financial statements not to be misleading.” In this regard, the FASB could provide further guidance as to the “certain circumstances” under which such disclosures would be appropriate.

Requirement for Tabular Disclosure in Each Annual and Interim Reporting Period by Class of Recognized (Accrued) Loss Contingencies

The proposed standard requires tabular disclosure in each reporting period of loss accruals by class and changes in those accruals during the preceding period. It is unclear what “by class”

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means under the proposed standard. If individually material items must be disclosed separately or if a single large case dominates a “class,” disclosure of the changes in the accruals during the period will give plaintiffs’ attorneys a view into the preparer’s thinking about the case. As discussed earlier, disclosure of specific accruals would adversely impact preparers’ posture in litigation, including by granting inappropriate leverage to plaintiffs in settlement negotiations.

We urge the FASB to reconsider the requirements for tabular disclosure or at least make it subject to an exemption for disclosures that would be materially prejudicial to the preparer as discussed below.

Certain Types of Aggregated Disclosures Should Be Eliminated

The ED allows disclosures to be presented on an aggregated basis under certain circumstances (450-20-55-1D). It further states that if disclosures are provided on an aggregated basis, an entity should disclose information that would enable financial statement users to understand the nature, potential magnitude and timing (if known) of loss contingencies. We support allowing companies to consider whether certain aggregated disclosures are appropriate. However, we have concerns about two of the specific examples provided in the ED of additional disclosures that preparers are encouraged to consider if they provide aggregated disclosure. The suggested examples are (1) the average amount claimed and (2) the average settlement amount. Such “averages” may not provide any useful information to financial statement users about the nature or potential magnitude of the aggregated loss contingencies because, among other things, they may be skewed by inflated claims or unique settlements. Since that information is unlikely to be disclosed in the financial statements, users of the financial statements will be unable to assess how representative such “averages” really are. The amount of plaintiffs’ demands often does not represent reliable or relevant information and is rarely representative of the actual amount paid when the claim is resolved. Requiring disclosure of the “average” amount claimed may actually provide misleading information to financial statement users. Similarly, requiring disclosure about the “average” settlement amount would suggest to financial statement users that this information is relevant to the outcome of the remaining loss contingencies, when instead that average may have been skewed by one or two exceptional settlements that are not indicative of the settlement prospects for the remaining loss contingencies.

We also are concerned about the ED’s explanation of the appropriate determination of eligibility for aggregation (450-20-55-1A). That provision suggests that similar litigation matters should not be aggregated unless they are in the same jurisdiction and have the same anticipated timing with regard to expected future cash outflows. This provision will have the unintended result of seriously limiting the opportunity for aggregated disclosure, which we believe should permit aggregation of similar types of claims wherever pending. In short, we support the provision in the ED that would allow disclosures to be provided on an aggregated basis but believe that the examples and types of claims that can be aggregated should be amended as discussed above.

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Requirement for Quantitative Disclosure of Possible Recoveries, If “Discoverable”

The ED requires preparers to disclose information about insurance and other possible sources of recovery if such information has been provided to a plaintiff or if it is “discoverable.” This poses serious problems. Courts often make the determination as to whether particular information is discoverable. When a court has not yet made a determination about discoverability, compelling the preparer to make a determination requires guesswork that usurps the role of the courts, may affect the course of the litigation, and could subject preparers to the risk of liability for false and misleading statements if their determinations are later proved wrong by the action of the court. Even when such information has been produced or is clearly discoverable, it is often produced under seal or pursuant to a confidentiality agreement or court order and is not available to third parties. The ED would make such information available to other plaintiffs’ attorneys who may bring claims they believe will be covered under a disclosed insurance policy in the hope of getting a quick settlement from the insurer.

We urge the FASB to limit any disclosure of potential insurance recoveries to cases where such information has been provided to the adverse party in a manner that is not confidential.

The Absence of an Exemption for Potentially Prejudicial Disclosures

The ED does not contain an exemption for potentially prejudicial disclosures that was contained in the FASB’s 2008 exposure draft. We understand the FASB’s position that changes made to the 2008 exposure draft justify the absence of the exemption on the grounds that since the ED does not require speculative disclosures about the likely course of a contingency there is no need for such an exemption for potentially prejudicial disclosures. Despite the changes in the ED from the previous proposed standard, we believe that there still will be instances where the disclosure required under the ED will be seriously prejudicial to preparers and an exemption should be included in any final standard.

The ED requires the disclosure of “other non-privileged information that would be relevant to financial statement users to enable them to understand the potential magnitude of the loss.” This requirement will apply to all disclosed contingencies, including remote ones. Such information, which may not be subject to any applicable privilege, may nonetheless involve highly confidential, previously undisclosed analyses and assessments of the contingency by management or its non-attorney agents. Moreover, aggregation of such contingencies will not in many cases provide a shield from disclosure. As discussed earlier in this letter, the proposed standard would require disclosures of items such as actual individual accruals, potential recoveries, and changes to accruals that may be seriously prejudicial to preparers particularly in pending litigation.

We urge the FASB to retain an exemption for information the disclosure of which would be determined by the preparer or its counsel to be prejudicial to the outcome of a contingency.

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Impact of the Proposed Standard on the Attorney/Client Privilege and Auditability of the Standard

The analysis of a number of items that must be disclosed under the ED, such as individual accruals and whether potential sources of recovery are “discoverable” in litigation, will rely heavily on the analysis of the attorneys involved in the cases. To the extent such determinations reflect legal advice given by those attorneys to the preparer, their disclosure risks waiving the attorney/client privilege. Auditors also will likely seek information from such attorneys since it may represent the best audit evidence for evaluating the disclosures. We are concerned that the protocol for communications between lawyers and auditors agreed to by the American Bar Association and the American Institute of Certified Public Accountants in 1976 (the Treaty) will no longer prove adequate in light of the new disclosure requirements because auditors will require more detailed disclosures from attorneys than is permitted under the Treaty.

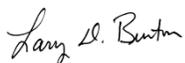
The Proposed Effective Date Needs to be Extended

The proposed effective date of the new standard - for fiscal years, ending after December 15, 2010 - is less than three months after the end of the comment period. Even if the FASB acts to adopt the standard promptly following the close of the comment period, preparers with December 31 fiscal year ends are likely to find complying with it in a timely manner to be extremely burdensome and expensive. As explained earlier, many large companies will have to undertake time-consuming analyses of many items. They will need to address such difficult issues as determining how some of the required information can be provided without causing privilege waivers. New analytic standards and new systems for categorizing and tracking litigation will be needed. All of this work would be required at the same time as preparers are dealing with the changes required by the recent financial reform legislation and the implementing regulations.

If contrary to our earlier recommendation, the FASB nevertheless moves forward to adopt a final standard, we urge it to extend the effective date of any final standard so that it will not be effective for fiscal years ending earlier than June 30, 2011.

We appreciate your consideration of our comments, and if we can provide additional information concerning our comments, please contact me at 202-872-1260.

Respectfully submitted,



Larry Burton
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