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Technical Director – File Reference No. 1600-100

Financial Accounting Standards Board
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LETTER OF COMMENT NO. 102

Re: FASB Exposure Draft –DISCLOSURE OF CERTAIN LOSS CONTINGENCIES; AN AMENDMENT OF FASB STATEMENTS NO. 5 AND 141(R)

Dear Technical Director:

On behalf of BNSF Railway Company (BNSF), I would like to applaud the Board on its efforts to improve transparency and existing reporting for loss contingencies. BNSF recognizes the need of investors to have accurate information regarding a company's financials; however, we are concerned about the breadth of sensitive and confidential information that the exposure draft contemplates being disclosed and that such information may harm the disclosing company without a commensurate improvement in the information available to investors.

Current guidance per FAS 5 requires the disclosure of loss contingency information that is relevant to investors while balancing the need of a company to protect privileged information that could harm the company's defense of claims. BNSF is concerned that requiring the disclosure of information that could be used against a company in underlying litigation will not significantly enhance the information currently available to our investors but may instead have the unintended consequence of causing great potential harm to the very investment made by those investors. In summary, BNSF does not believe that the proposed change would provide sufficient additional benefit to justify the risks involved in amending this particular reporting requirement for the following reasons:

1. **Companies would be required to provide their own estimate of their maximum loss exposure where the claimant has not stated a claim amount.** In cases where no claim amount is stated (which occurs often), Companies would be required to provide their "best estimate" of their maximum exposure. This requirement would force Companies to quantify and disclose their potential maximum exposure in an adversary proceeding where the claimant itself has been unwilling or unable to quantify the maximum loss. BNSF is concerned that by disclosing a maximum exposure it is likely to be asked in the litigation to justify that amount and thus to give a Plaintiff a theory on how to maximize the amount of the claim.

2. **The required qualitative disclosures may reveal Company's thinking and strategy for dealing with the claim.** The required disclosure of the company's "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" runs the risk of revealing aspects of a Company's litigation strategy that historically has been carefully guarded. For example, stating that a Company expects to resolve, or not resolve, a claim in the next year, sends a message to a plaintiff about the Company's litigation posture regarding the case, eliminating a useful strategic tool in dealing with claims. Signaling the timing of settlement, the likely amount thereof, and the theories behind those assessments, will only serve to improve the bargaining position of an opponent and thus harm a Company's ability to successfully resolve a dispute.

3. **The disclosures themselves may constitute admissible evidence or affect the course of the underlying lawsuit.** The required estimates and disclosures may be found to be admissible in evidence against the company in the underlying litigation itself or they may alter the outcome of the litigation by changing the course of settlement discussions or other outcome determining matters. In some plaintiff friendly jurisdictions plaintiffs have vigorously sought information regarding how Railroads account for certain liabilities for the purpose of either establishing damages or in creating a floor for settlement negotiations. Creating such harms to a Company's finances is not justified by the minimal increase in information gained by investors.

4. **The proposed disclosures may lead to waivers of the attorney/client privilege and lawyer's work product privilege.** Since the required disclosures will likely be based on confidential communications between Railroads and their lawyers, there is a risk that the disclosures will constitute waivers of the attorney/client privilege or work product immunity. In addition, since independent auditors will likely want to test these estimates and disclosures as part of their audit work, there may be increased pressure for them to seek detailed information from counsel in the course of their work that will also pose additional waiver risks. BNSF understands that the American Bar Association will be commenting in greater detail on this risk and defers to the ABA's expertise in this area but, shares in this vital concern.

5. **Disclosures and estimates that turn out to be wrong may be sources of additional litigation.** Assessments of pending and threatened claims, particularly those involving litigation, are inevitably uncertain and subject to factors outside the control or ability to foresee of any of the parties. As a result, the required disclosures and estimates themselves, when they prove to be inaccurate, as some inevitably will, may be sources of additional claims and litigation against Companies.

6. **FASB's proposal to deal with information prejudicial to a company's position may not be sufficient.** FASB specifically recognizes that for certain loss contingencies such as pending or threatened litigation disclosure of certain information about the contingency may be

prejudicial to a Company's litigation position. In that event, the proposal provides that disclosures may be aggregated and reported at a higher level or, "in rare instances," omitted altogether. This approach may not address the problem since in many situations a single case or subset of cases poses a much greater threat of loss than others and sophisticated users of the company's financial statements are likely to know that and be able to decipher those cases from the others in the "aggregate" quantitative and qualitative disclosures. Environmental claims are a key example, by simply watching changes to the tabulated disclosures and matching those to new sites disclosed, a third party will likely reach fairly accurate estimates of the amounts related to those new sites. To the extent that a company aggregates claims into such a large pool that the ability to decipher information becomes improbable, the value to investors of disclosing such information becomes lost.

FASB's proposed amendment contains a second level attempt to deal with the problem of prejudice in those "rare instances" where even aggregation at a high level would not prevent it. In such cases, Companies could omit their qualitative assessment of the most likely outcome but would still have to disclose the amount of the claim or their estimate of the likely maximum loss exposure and describe the factors that will likely affect the outcome of the matter. FASB has made clear that even this limited protection will only be available in "rare instances." This safe harbor may not provide any significant protection to Companies.

In addition, the requirement that Companies disclose information about even remote loss contingencies if they are expected to be resolved in the near term if they could have a severe impact on the entity's financials, leads to the troubling issue of a company having to disclose a remote situation upon which an applicable statute of limitation will run in the next year. Thus, a company may be required to publicly state that a potentially material remote claim exists that claimants had decided not to pursue or may not be aware of thus inviting litigation that would not have otherwise been filed.

In conclusion, based on the reasons given above, BNSF considers the greatest benefit for the financial statement users to be continued reporting under the current guidance.

Thank you for the opportunity to comment on this very important issue. If you have any questions on BNSF's comments, please feel free to contact me at (817) 352-4940.

Sincerely,

/S/

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