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LETTER OF COMMENT NO. 44

Technical Director – File Reference No. 1600-100
Financial Accounting Standards Board ("FASB")
401 Merritt 7
P.O. Box 5116
Norwalk, Connecticut 06856-5116

Via email: director@fasb.org File Reference No. 1600-100

Dear Technical Director:

Alcon Laboratories, Inc. ("Alcon") appreciates the opportunity to share its comments on the accounting issue regarding the FASB's Exposure Draft ("ED") relating to Disclosure of Certain Loss Contingencies, which would amend FASB Statements No. 5 and 141(R).

We believe that FASB Statement No. 5 is not broken and does not need repair or supplementation. The very uncertain nature of loss contingencies is such that investors, other users, and reporting entities will never have all of the information they desire to assess the likelihood, timing, and amount of future cash flows associated with loss contingencies. Alcon opposes the adoption of this ED. In particular, we believe the additional proposed disclosures with regard to uncertainties create undesirable results for the reporting entity, investors, and other financial statement users.

Litigation is, by nature, unpredictable and subject to change. Some parties to litigation use it as a part of an overall effort to gain a negotiating edge in the settlement of business related issues. As a result, the process of reasonably estimating and valuing the potential outcome is difficult at best. Furthermore, initial plaintiffs often seek damages that far exceed a reasonable settlement amount even for meritorious claims. To require inclusion of amounts of initial damages claims in any disclosure will provide more incentive to inflate these initial claims in order to pressure defendants to settle quickly to avoid disclosing those inflated "maximum exposures."

While the disclosure of possible settlements is by definition too speculative to provide meaningful information for legitimate financial statement users, it would undoubtedly be useful to attorneys representing parties adverse to the discloser.

In answering the specific questions of the exposure draft, Alcon will focus primarily on loss contingencies relating to litigation.

The following are our replies to the specific exposure draft questions:

Question 1

Will the proposed Statement meet the project's objective of providing enhanced disclosures about loss contingencies so that the benefits of those disclosures justify the incremental costs? Why or why not? What costs do you expect to incur if the Board were to issue this proposed Statement in its current form as a final Statement? How could the Board further reduce the costs of applying these requirements without significantly reducing the benefits?

No. Assuming that any anticipated benefits are not illusory, we believe that the incremental costs of providing the disclosures about loss contingencies will exceed such benefits. The expansion of disclosures prescribed in paragraph 6 of the ED to include remote contingencies increases significantly the work and the related cost. Combining soft contingency data with hard analytical data will raise questions that will require time, effort and expense to address. The ED would force the reporting entity to incur greater expense engaging lawyers and accountants to make the contingency projections, and then to defend them when questions arise later. The incremental costs of determining the ultimate impact of a specific claim against a company appear to create a need to continually update the status of each claim. Because most companies employ outside counsel who are experts in the type of claim or in the location of the court action, this would increase legal fees related to these claims as this outside counsel must provide documentation for outside auditors even when no changes have occurred.

In addition, the disclosures of litigation with only remote chances of adverse consequences will encourage the proliferation of additional claims by plaintiffs' lawyers and result in further costs to the reporting entities to defend such claims. Legal costs will continue to become a larger portion of operating costs for reporting entities.

Certainly eliminating the reconciliation would eliminate some of the costs of the proposed Statement. However, withdrawing this project would be the most beneficial action the Board could take to reduce the costs to issuers and their investors. If issuers will apply the current standards in the manner in which they were intended, there is no need to create new disclosure guidance.

Question 2

Do you agree with the Board's decision to include within the scope of this proposed Statement obligations that may result from withdrawal from a multiemployer plan for a portion of its unfunded benefit obligations, which are currently subject to the provisions of Statement 5? Why or why not?

No. In keeping with the "Going Concern" concept of accounting, we feel the disclosure of liabilities that "may occur" if management makes a decision to change its method of operation should not be disclosed if management has no intention of making the change.

Furthermore, an employer may not be in a position of control to require the multiemployer plan administrator to provide this information. If the multiemployer plan administrator refuses to make such information available in the absence of an actual withdrawal, an employer would be unable to report this information.

Question 3

Should an entity be required to provide disclosures about loss contingencies, regardless of the likelihood of loss, if the resolution of the contingencies is expected to occur within one year of the date of the financial statements and the loss contingencies could have a severe impact upon the operations of the entity? Why or why not?

No. We believe that losses that are unlikely to occur should not be subject to disclosure, even if the disposition is expected within a year. Although there is always a chance of an event occurring at a particular time, a loss that has only a remote chance of occurring is a normal background risk in all investments. Litigation and negotiations are not precise processes in which final decisions always occur within prescribed timetables. Furthermore, given recent calls for simplification of financial statement disclosures, providing data on remote contingencies does not serve the purpose of providing useful information to investors.

For example, it seems, under this approach, most entities would need to address the remote possibility that a random, though catastrophic, event such as an earthquake or a hurricane striking a manufacturing facility, could occur within the next twelve months.

As previously indicated, we believe that the disclosure of remote contingencies will lead to the proliferation of additional harassing litigation.

Question 4

Paragraph 10 of Statement 5 requires entities to "give an estimate of the possible loss or range of loss or state that such an estimate cannot be made." One 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. The Board decided to require entities to disclose the amount of the claim or assessment against the entity, or, if there is no claim or assessment amount, the entity's best estimate of the maximum possible exposure to loss. Additionally, entities would be permitted, but not required, to disclose the possible loss or range of loss if they believe the amount of the claim or assessment is not representative of the entity's actual exposure.

a. Do you believe that this change would result in an improvement in the reporting of quantitative information about loss contingencies? Why or why not?

No. Due to the unpredictable and constantly changing nature of litigations, reasonably estimating any resolution is problematic. The fact that many entities state "that the possible loss cannot be estimated" is a result of the difficulty in predicting the outcome of any specific situation. As recognized by the authors of Statement No. 5, often there are contingencies for which no quantification of the amount of loss can be determined. To provide disclosure of amounts which cannot be accurately estimated would provide misleading information to the company's stakeholders.

b. Do you believe that disclosing the possible loss or range of loss should be required, rather than optional, if an entity believes the amount of the claim or assessment or its best estimate of the maximum possible exposure to loss is not representative of the entity's actual exposure? Why or why not?

No. Disclosing the possible loss or range of loss that an entity believes will occur should not be required. If an entity reveals its position for settling a situation, opposing counsel has an established floor for making a settlement offer. Furthermore, there are often situations that, because of new laws, new types of claims and the status of the discovery, an entity may be unable to estimate a range of loss, although the entity expects the loss will be significantly less than the claim. Like the "maximum possible exposure" requirement, required disclosure of the range puts the disclosing party in a no-win situation; if the range is too broad, investors will complain that it is meaningless; if it is narrow but turns out wrong, investors will complain even more.

c. If you disagree with the proposed requirements, what quantitative disclosures do you believe would best fulfill users' needs for quantitative information and at the same time not reveal significant information that may be prejudicial to an entity's position in a dispute?

User's have a need for "accurate" quantitative information that is based on reasonable estimates. At the same time, investors have the need to protect the assets of the entity in which they are invested. Disclosures that provide "inaccurate" estimates for the sake of having "quantitative" information do not provide the users of financial reports with useful information.

Current accounting rules and methods are intended to provide users of financial information with a clear picture of an entity's current position and results of operations. To the extent that the entity will incur a liability and that liability can be reasonably estimated, it should be disclosed. However, to try to quantify issues that are not likely to occur or cannot be reasonably quantified will not provide the quality of information that users of financial statements need. Furthermore, providing this type of information will obscure the useful information that is presently provided.

If, however, the disclosure proposed is required, it will create expectations on the part of the financial statement user that the new disclosures are of the same reliability as other disclosures. If these attempts at quantification do not prove to be accurate, the users will use the disclosures as a basis to seek restitution for any losses they incur as a result of relying on the information. In essence, the plaintiffs' lawyers will have a roadmap that will enable them to "recruit" new plaintiffs to represent for new claims. Although the reporting entity will disclose the information as an estimate that is subject to change, plaintiffs' lawyers will use the disclosures to "mine" financial statements for new claims. The reporting entities will incur new costs to defend these claims.

Question 5

If a loss contingency does not have a specific claim amount, will an entity be able to provide a reliable estimate of the maximum exposure to loss (as required by paragraph 7(a)) that is meaningful to users? Why or why not?

No. In some states, lawsuits are allowed to be filed without quantifying the amount of relief sought. With or without a claim amount, we feel that there are and will continue to be contingencies for which an entity's ability to meaningfully estimate an amount will not be possible. As noted above, even when a claim amount is available, the likelihood of that amount representing the actual amount of any eventual liability is rare. With the ability of litigants to negotiate or enter the appeals process, even judgment amounts are subject to change. "Maximum exposure" suggests a worst case scenario where everything that can go wrong will go wrong. For a company defendant, this means that every factual question, every legal issue, and every theory of economic recovery would be resolved in the plaintiff's favor. Following this approach, every run of the mill slip-and-fall case would be transformed into a potentially material adverse event. Requiring the defendant company to legitimize what might be a completely frivolous claim (by reporting a strictly hypothetical "maximum exposure") will not only send a false alarm to investors, but will also make it virtually impossible for the company to settle suits for anywhere near the reasonable value of the claim. Thus, this ED would not only confuse investors, but would also significantly impair a company's ability to settle claims, thereby increasing its legal expenses.

Question 6

Financial statement users suggested that the Board require disclosure of settlement offers made between counterparties in a dispute. The Board decided not to require that disclosure because often those offers expire quickly and may not reflect the status of negotiations only a short time later. Should disclosure of the amount of settlement offers made by either party be required? Why or why not?

No. We agree with the decision to not require disclosure of settlement amounts. The nature of settlement offers are often too short term and would not accurately reflect the status of the negotiation. Furthermore, there are often government rules, court-orders, or contractual obligations to keep such negotiations confidential.

Question 7

Will the tabular reconciliation of recognized loss contingencies, provided on an aggregated basis, provide useful information about loss contingencies for assessing future cash flows and understanding changes in the amounts recognized in the financial statements? Why or why not?

No. A tabular reconciliation of recognized loss contingencies, even on an aggregated basis, creates an impression of certainty with regard to the ultimate disposition of claims. However, due to the frequently changing nature of litigations, information provided in a tabular reconciliation about loss contingencies may not be useful to investors for future estimation of cash flows. Furthermore, providing such disclosures may only assist the opposing party on the claim to achieve their desired result, when a lesser settlement may have been achieved otherwise. We also feel that with the possibility of considerable fluctuations (e.g. reversals) from one quarterly reporting period to another, the proposed disclosure requirements should not be applicable to quarterly reports. We believe that a tabular reconciliation will be damaging to the reporting entity's negotiating strategy and should not be provided in any disclosures.

Question 8

This proposed Statement includes a limited exemption from disclosing prejudicial information. Do you agree that such an exemption should be provided? Why or why not?

If the ED's proposed disclosures are promulgated, we agree that the reporting entity should be permitted to omit prejudicial information. However, as discussed in our reply to Question 10, the exemption should not be limited. Allowing an entity the ability to assess the possible effects a litigation disclosure could have on settlement negotiations or the litigation itself is essential. While the stated goal of the proposed rule is to increase the level of useful information provided to investors, an entity should be permitted to withhold information that is of little or no value to the investor, but that could have a negative impact to the entity and, in the end, to the investor as well. In addition, we feel that requiring the disclosing company to make a statement that disclosures were omitted because they may have contained prejudicial information will defeat the purpose of the exemption altogether. Such statements would be used by plaintiffs' lawyers to support a sort of "confession theory" in the making of their case.

Question 9

If you agree with providing a prejudicial exemption, do you agree with the two-step approach in paragraph 11? Why or why not? If not, what approach would you recommend and why?

As mentioned in our answer to question 8, allowing an entity the ability to assess the possible effects a litigation disclosure could have on negotiations is essential. The

FASB's two-step approach, while recognizing the problem, does not adequately address it. A disclosing entity is given two options: 1) disclose prejudicial information, or 2) disclose that presumptively prejudicial information has been omitted. Neither option serves the interest of the entity or its investors. Disclosing the omission and the reasons behind it would only provide ammunition for a plaintiff to assert that the entity must have something to hide and lead to additional or prolonged litigation.

Question 10

The International Accounting Standards Board (IASB) continues to deliberate changes to IAS 37, Provisions, Contingent Liabilities and Contingent Assets, but has not yet reconsidered the disclosure requirements. The existing disclosure requirements of IAS 37 include a prejudicial exemption with language indicating that the circumstances under which that exemption may be exercised are expected to be extremely rare. This proposed Statement includes language indicating that the circumstances under which the prejudicial exemption may be exercised are expected to be rare (instead of extremely rare). Do you agree with the Board's decision and, if so, why? If not, what do you recommend as an alternative and why?

We expect that the use of the prejudicial exemption would not be "rare," much less "extremely rare," given the litigious climate in the business world today. As discussed in previous responses, we believe that the election to forego disclosing prejudicial information would be commonplace and we believe that the FASB therefore should remove the language from the ED suggesting that the exemption should rarely be used. An entity has to be allowed the ability to appropriately assess the ramifications of disclosing non-public information. If that assessment results in a negative outlook, then an entity should have alternative choices without the unnecessary pressure of worrying about the frequency of using the exemption. In addition, keeping the expectation of the use of the exemption as rare could lead to entities needlessly disclosing information to their own detriment.

Question 11

Do you agree with the description of "prejudicial information" as information whose "disclosure . . . could affect, to the entity's detriment, the outcome of the contingency itself"? If not, how would you describe or define "prejudicial information" and why?

Generally, yes. Prejudicial information can be any information that could affect the outcome of current contingencies as well as any future situation. This is one of the reasons that the terms of many legal settlements are kept confidential.

Question 12

Do you believe it is operational for entities to disclose all of the proposed requirements for interim and annual reporting periods? Should the tabular reconciliation be required only annually? Why or why not?

As mentioned in our answer to question 7, we believe that, if the ED is promulgated, the proposed disclosure requirements should not apply to quarterly reports. If required, the tabular information should only be reported annually.

Question 13

Do you believe other information about loss contingencies should be disclosed that would not be required by this proposed Statement? If so, what other information would you require?

We believe there should be no disclosure requirements beyond those presently set forth in FASB Statement No. 5.

Question 14

Do you believe it is operational for entities to implement the proposed Statement in fiscal years ending after December 15, 2008? Why or why not?

The implementation of this Statement in its proposed form will require extensive coordination of judgment on the part of the entity, its outside legal counsel and its external auditors. In order to provide sufficient lead time to develop any reasonable estimates, the implementation should be delayed until fiscal years ending after December 15, 2009 and the quarterly requirements should be removed as noted in our response to question 7.

In summary, we believe the disclosure of loss contingencies should continue to be prescribed under FASB Statement No. 5 in its present form. In addition, an entity should not be forced to disclose speculative or intentionally inflated claims or other information that could be detrimental to the entity's defensive position in a claim negotiation or a court case. Most of all, information provided to the users of financial statements must be relevant and reliable or the usefulness of that information will be impaired.

We appreciate the FASB's consideration of our comments.

Very truly yours,

/s/ Mark Roewe
Mark A. Roewe
VP, Global Controller