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LETTER OF COMMENT NO. 211

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Mr. Robert H. Herz
Chairman
Financial Accounting Standards Board
401 Merritt 7
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Sir David Tweedy
Chairman
International Accounting Standards Board
30 Cannon Street
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Re: Draft Amendment to Statement of Financial Accounting Standards No. 5
File Reference No. 1600-100

Gentlemen:

We appreciate the opportunity to present our views of the June 5, 2008 Financial Accounting Standards Board's exposure draft entitled *Disclosure of Certain Loss Contingencies: An Amendment of FASB Statements 5 and 141(R)*. A number of companies have signed this letter to show their concern regarding the draft amendment, recognizing that they may not agree with all the positions taken herein. Cooley Godward Kronish LLP is a national law firm for the converging worlds of high technology, high finance and high-stakes litigation. We are counselors, strategists and advocates for the foremost private and public companies across a wide variety of industries and in all major technology fields. Our clients include business organizations, entrepreneurs, venture capitalists, financial institutions, private equity firms, professional services firms and real estate owners and developers. We have approximately 650 attorneys and represent clients in more than 20 industries.

BACKGROUND

The draft amendment represents a fundamental change in the disclosure requirements related to certain loss contingencies, particularly litigation related contingencies. The draft amendment is designed to address concerns "that disclosures about loss contingencies under existing guidance in FASB Statement No. 5, *Accounting for Contingencies*, do not provide adequate information to assist users of financial statements in assessing the likelihood, timing, and amount of future cash flows associated with loss contingencies."

SUMMARY OF POSITION

THE DRAFT AMENDMENT WILL RESULT IN INCREASED COSTS WITHOUT ANY ATTENDANT BENEFITS.

Our belief is that the draft amendment would result in increased compliance costs, subject defendant corporations to heightened litigation risks, and dramatically alter the amount of information available to plaintiffs, all without any significant benefits to investors or other users of financial statements. As discussed further below, we believe that the current regime of Statement of Financial Accounting Standards No. 5 *Accounting for Contingencies* ("SFAS No. 5"), coupled with the disclosure

requirements of the federal securities laws, provides investors and the users of financial statements with sufficient information regarding litigation related contingencies. We recognize that the draft amendment does not distinguish between private and public reporting corporations and that the draft amendment would apply equally to both classes of corporations. While the focus of this letter is the application of the draft amendment to public reporting corporations, the Board must take note of significant costs that private corporations, large and small, will incur if the draft amendment is adopted. We believe the Board should take note of the existing disclosure obligations of public reporting corporations under the federal securities laws. While private corporations do not follow the same disclosure regime, the disclosure requirements contained in the federal securities laws could be used as a model for private corporations vis-à-vis the Board's standards setting process to provide users of these financial statements with this additional information.

For over three decades SFAS No. 5 has been the standard by which corporations, their independent registered public accounting firms and counsel have evaluated litigation based contingencies. We are unaware of the emergence of any fundamental underlying issue that now warrants such a fundamental change to SFAS No. 5. In fact, the complexity of litigation has only increased over the past three decades making the proposed qualitative and quantitative disclosures that much more problematic and requiring a multi-disciplinary approach toward solving any perceived inadequacies of SFAS No. 5.

THE DRAFT AMENDMENT REQUIRES FURTHER STUDY, REQUIRES AN IMPLEMENTATION PLAN AND THREATENS ATTORNEY-CLIENT PRIVILEGE COMMUNICATIONS BETWEEN CORPORATIONS AND THEIR LEGAL COUNSEL.

While we appreciate the Board's work in this area, we believe that the risks to defendant corporations far outweigh any perceived benefit of the draft amendment and that any such amendment should be further studied through a multi-disciplinary approach which also involves the input of corporations, the American Bar Association, state bar associations, investor groups and independent registered public accounting firms so the practical impact of implementing any such amendment can be carefully weighed and evaluated. As discussed further below, we are particularly concerned regarding the practical effect of the draft amendment upon attorney-client privilege. The draft amendment does not provide guidance as to the implementation of the amendment, and the practical effect of its implementation could seriously undermine the ability of attorneys and defendant corporations to freely communicate under attorney-client privilege.

THE DRAFT AMENDMENT WILL ENCOURAGE FURTHER LITIGATION AND THREATENS COMPETITION BY U.S. CORPORATIONS.

Billions of dollars are spent by corporations each year both as defendants and plaintiffs in litigation. We do not believe that the complex subjective judgments of such corporations, their counsel and experts can be summarized, condensed and reduced to a point that will meaningfully enhance an investor's understanding of a corporation's financial condition and health, but that such a goal will instead result in further litigation, provide a roadmap for plaintiffs and seriously compromise the ability of corporations to properly defend themselves in a court of law. In an era in which the competitiveness of corporations in the U.S. is constantly assailed due to stringent regulations, this draft amendment can only serve to weaken the competitiveness of U.S. corporations.

RESPONSE TO THE REQUEST FOR COMMENT

Below please find our specific responses to the Board's questions. For the Board's convenience we have prefaced each response with the text of the Board's question.

1. *Will the draft 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 draft 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?*

   While we respect the Board's wish to provide enhanced disclosures about loss contingencies to investors and users of financial statements, we believe that direct incremental costs of complying with the enhanced disclosure requirements through the engagement of legal counsel, increased audit and review procedures and the use of other experts to quantify loss contingencies will increase significantly and do not justify the implementation of the draft amendment. In addition to the direct costs of implementation, for the reasons discussed below, we believe that the collateral costs of the implementation of the draft amendment upon actual litigation will be substantial.

2. *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. Categorical disclosure, without consideration for the likelihood of loss, consumes both the time and resources of a defendant corporation while introducing potentially inaccurate information into the financial marketplace. With respect to resources, a corporation would be required to disclose every single frivolous suit, simply because the claim "could have a severe impact." Every plaintiff has an incentive to assert a claim for significant damages and the proposed amendment will only further encourage such behavior. As a result, the Board's draft amendment may invite tyranny by officious litigants who exploit heightened disclosure requirements to extract settlement offers for less than "severe" sums otherwise asserted or theoretically possible.

   Moreover, evaluating such contingencies would be based on both an imprecise guess as to the timing of the resolution of the contingency and an assessment by management of the severity of pending or threatened litigation. The inherently tentative nature of litigation makes estimating the timeframe for dealing with claims as well as a defendant corporation's level of possible exposure an incredibly speculative task. One of the goals of the draft amendment is to provide information relating to the "timing, and amount of future cash flows associated with loss contingencies." We believe that despite management's best efforts to provide information regarding timing and impact on future cash flows and given legal processes both in the U.S. and abroad, defendant corporations will be attempting to look years into the future to describe such contingencies. Defendant corporations already generally disclose anticipated major scheduled court or mediation dates affecting ongoing litigation in their periodic reports filed with the Securities and Exchange

Commission. However, the draft amendment would force a defendant corporation to look far into the future, assuming exhaustive litigation until the projected date when all appeals by both sides of the litigation could be exhausted, when in reality a settlement between the parties could possibly be achieved at any time or a decision is made not to appeal, thereby rendering the original disclosure moot. Such disclosure would always be subject to the condition that the timing and effect on future cash flows is highly uncertain, thereby rendering the disclosure useless and potentially misleading until immediately before the last appeal is exhausted or settlement is reached.

3. *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. While we are mindful of the Board's concerns regarding loss contingencies, this change will only increase the volume of disclosure, but not the accuracy of such disclosure. Because there are fairly few cases in which the likelihood of a loss is "remote," the amendment will result in a de facto disclosure rule, not an exception. In such instances, a defendant corporation would have to disclose the amount of the claim, or if no amount is claimed, its "best estimate of maximum possible exposure to loss."

Neither of these scenarios represents an improvement in reporting because it only increases the disclosure of an inherently inflated and speculative potential loss amount which may provide little utility to financial statement users. Litigation is fundamentally unpredictable and the end result is often a product of many unforeseen factors. The road to resolution necessarily involves a fair amount of volatility and ever-changing assessments by management. Everything from discovery of new information or innovation of legal arguments, to changes in strategy, settlement offers, venues, and even judges and juries can alter the trajectory of the process. Accordingly, a corporation's estimate of "maximum possible exposure" is inherently difficult to provide with any accuracy or precision. Often, management's present best-guess will bear little resemblance to later, actual losses because they simply represent a snapshot of the situation, at the time of the estimate. For example, a corporation's disclosure estimate before discovery may look drastically different after discovery. Expanding disclosure here by demanding a potentially inaccurate worst-case scenario from management could only confuse investors more and mislead them with an estimate which could always be a moving target. Even where the claim is stated or known, the fundamental problem of forecasting litigation results still apply, such that fuller disclosure should not be adopted.

Ultimately, loss contingencies related to litigation are very different from others within the scope of SFAS No. 5. Other in-scope contingencies generally relate to a corporation's operations and hence are generally within the control of the corporation. The outcome of litigation is more unpredictable because it is subject to legal and judicial processes. Combined with the fact that claims may be motivated by any number of unpredictable factors such as publicity or leverage on an unrelated matter, the degree of uncertainty surrounding "maximum possible exposure" estimates is exceptionally great. Given this, the Board should not seek to augment quantitative disclosures by requiring a corporation to make these unreliable estimates.

We believe Item 103 of Regulation S-K has struck the right balance and provides registrants who file periodic reports with the Securities and Exchange Commission with clear guidance in this area. Item 103 states:

> "Describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. Include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought. Include similar information as to any such proceedings known to be contemplated by governmental authorities."

The instructions to Item 103 further provides clear guidance to registrants that:

> "No information need be given with respect to any proceeding that involves primarily a claim for damages if the amount involved, exclusive of interest and costs, does not exceed 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis."

The federal securities laws do not require a defendant corporation to disclose "if there is no claim or assessment amount, the entity's best estimate of the maximum possible exposure to loss." Federal securities merely require a defendant corporation to simply state the facts and not engage in quantitative speculation. Financial statements are historical in nature and forward-looking disclosures (e.g. contractual commitments) are well grounded in fact as should as any additional disclosure regarding litigation contingencies.

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. Requiring an entity to make further mandatory disclosures regarding "actual exposure" only serves to extend its liability later if the estimate of the loss or range of loss is incorrect. Much like an estimate of "maximum possible exposure," an estimate by a defendant corporation of a "possible loss or range of loss," is still premised on the idea of guessing the result of uncertain litigation proceedings. This amounts to a similar degree of speculation and "dart-throwing" by a defendant corporation. Faced with this scenario, corporations may trend toward over-estimation to protect themselves from future potential claims and securities litigation regarding such

estimates. Counsel may also trend toward higher estimates if such disclosure is mandated knowing that a defendant corporation may face additional securities litigation if the resulting loss is greater than estimated.

The incongruence of the Board's draft amendment with the current standards in the "treaty" between the American Bar Association and the American Institute of Certified Public Accountants, governing lawyers' responses to auditors' inquiries, further highlights why management should not be required to estimate the "possible loss or range of loss." The ABA Statement of Policy Regarding Lawyers' Responses to Auditors' Request for Information specifically states that where a lawyer is asked to estimate the potential "amount of loss or range of loss" in the event an unfavorable outcome is not "remote," such an estimate "will normally be as inherently impossible to ascertain, with any degree of certainty, as the outcome of the litigation." The ABA's guidance is highly cognizant of the unpredictability of litigation, explaining why it is exceedingly unusual in practice for legal counsel to estimate a loss or range of loss when responding to auditors' requests for information. Accordingly, litigation claims are typically disclosed in a limited manner, confined to the basic facts describing the claim, but without loss estimates or qualitative statements, and often mirror the disclosure required under Item 103 of Regulation S-K. Here, the Board should remain consistent with the ABA's Statement of Policy and not require estimates which may inevitably be inaccurate and put a defendant corporation's counsel in a no-win situation.

c. *If you disagree with the draft 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?*

No changes with respect to quantitative disclosures should be made to SFAS No. 5. The optional disclosures under the current version should remain in place. While the desire for quantitative disclosures is appropriately motivated, an incremental increase in disclosures beyond the present regime, other than a description of the legal action, will only hurt defendant corporations by exposing them to more liability. The attendant costs and uncertainties of making litigation loss estimates or even disclosing an initial claim amount or assessment warrant rejection of the draft amendment. Requiring additional quantitative disclosures in this manner does not guarantee that the information given to financial statement users will be accurate, nor that it will offer a clear, true view of the entity's financial health. We believe that Item 103 of Regulation S-K as discussed above provides investors and users of financial statements with appropriate information.

4. *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. As noted above, an "estimate of the maximum possible exposure to loss" is inherently unreliable because litigation results can be erratic. By definition, the maximum possible number is not a rational reasonable number. If a plaintiff cannot even state an amount, it may be exponentially more difficult, if not impossible, for the defendant corporation to reliably estimate the boundaries of a worst-case scenario. In fact in some states, California among them, the

plaintiff is not even required to state an amount of damages. Instead a plaintiff can merely ask for damages according to the proof. The draft amendment would therefore require a defendant corporation to make an estimate of damages where the plaintiff has not and in many cases where the defendant corporation may not even be in possession of all the facts necessary to even attempt to value the plaintiff's claim. Any estimate made will suffer from the fundamental uncertainty that underlies all adjudication of claims but also from the difficulty of not having any barometer for what losses a judge or jury may decide upon.

Rather than providing meaningful information to users, compulsory estimates of maximum possible exposure will instead trigger a wasteful "blame game" if and when those estimates are wrong. Disgruntled investors could easily point to management for making unreliable, "reliable estimates" or even to the independent registered public accounting firms for attesting to the financial statements. While financial statement users understandably want more transparency in their investments, appearance of certainty when none exists is anything but transparent. Obtaining such disclosures through obligatory forecasting of the potential losses will present a significant increase of risk that disclosure will be misleading and thus saddle these very corporations with additional liability. In addition, such estimates may only embolden plaintiffs with ambiguous claims by broadcasting the corporation's assessment of their "maximum possible exposure". Conceivably, such estimates would provide an unsure claimant with a clearer idea of the value of his suit and might encourage him to continue further with litigation (when he might not) or worse, decide to later state a higher claim.

5. *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. Settlement offers made by either party should be kept entirely confidential because they do not provide meaningful information to financial statement users. The majority of settlement offers are proffered to mitigate continued legal proceedings which consume the time and resources of all parties involved. As such, offers are simply blips along the negotiation road which may not accurately reflect a defendant corporation's actual possible exposure, but only show the parties attempted negotiation of a resolution at that time. Required disclosure of settlement offers could actually provide disincentive for making them and thus increase the likelihood of prolonged litigation. The Board's prudent decision to exclude this requirement is supported by the fact that such offers represent dynamic points in the litigation process which can change or terminate quickly. New information or slight changes in bargaining power or strategy may result in altered settlement offers, underscoring their inherent volatility. Like estimates of "maximum possible exposure," disclosure of every settlement offer between parties would offer little reliable information to financial statement users and should not be required. In addition, most offers of settlement are confidential and not admissible in court under the law of the relevant jurisdiction.

As noted above, heightened disclosure would not serve any useful purpose, other than to lead to further litigation. In the event an offer was not accepted and the ultimate conclusion ended up more costly, investors could second guess management. This could ultimately make corporations

especially sensitive to suits, and cause them to quickly settle what would be a baseless claim to avoid disclosure and attention.

6. *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?*

From a quantitative perspective, the draft tabular reconciliation contemplated in paragraph 8 does not differ from other currently required tabular reconciliations. However, the requirement to provide "a qualitative description of the significant activity in the reconciliation," for the reasons stated above, requires a subjective assessment of litigation and the underlying analysis, which again could provide plaintiffs with insight into the merits of the defense. Furthermore, these disclosures still do not provide an accurate assessment to financial statement users of future cash flows. As these contingencies are still uncertain, the information provided may drastically change at any time, diminishing their predictive utility. Unlike disclosure of resolved contingencies, which are reflected by current cash flow disclosures, qualitative descriptions of ongoing claims are subject to constant adjustments, such that they will not necessarily provide a lucid picture of a corporation's financial viability.

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

Yes. If the Board decides to implement the draft amendment as drafted, it should provide an exemption from disclosing prejudicial information that is as broad as possible. A less restrictive exemption is necessary to avoid placing entities at a huge disadvantage in litigation, especially when the Board's draft disclosures are so expansive. Without such an exemption, an entity's strategic position would be compromised and it would be forced to disclose information which may be useful to its adversaries during litigation. In many cases, any disclosure at all of a corporation's assessment of litigation or potential claims will give significant insight otherwise unavailable to opposing counsel. As such, quantitative and qualitative descriptions are normally guarded in adversarial proceedings so that the plaintiff is neither emboldened by affirmation of his credibility, nor given helpful details regarding the corporation's litigation strategy. While there may be occasional instances where disclosure might not prejudice a corporation, an exemption should be instituted to address the inevitable slew of prejudicial disclosures that will follow if the Board's amendment are implemented.

In practice, expanding disclosure requirements without providing a prejudicial information exemption would force management to flout its fiduciary obligations to comply with SFAS No. 5. Management of any corporation carries the responsibility to do everything commercially reasonable to protect the corporation's assets for the benefit of shareholders and investors. If the Board expands disclosure requirements to the point where management cannot keep information beneficial to a plaintiff confidential, even through an exemption, then management has no choice but to breach its fiduciary responsibility. To comply with the amendment, management may need to disseminate information harmful to the corporation's interest. Rather than placing management in this precarious bind, the Board should stay with the current requirements of SFAS No. 5 and allow a company's management to make voluntary disclosures regarding litigation,

where it deems it appropriate. However, if the Board does enact the draft amendment in full, the exemption from the disclosure of prejudicial information should be considered imperative as well.

The exemption would have greater practical utility if it were expanded in a manner that would expressly include the prejudice to a corporation's interests (and those of its shareholders) in risking the loss of protections of attorney-client privilege and immunity of attorney work product from mandatory disclosure or service of process. Whether or not a corporation voluntarily elects to disclose information covered by such protections in its financial statements, auditors are putting increasing pressure on them to share such information with the auditors as a condition to delivering an unqualified report on those financial statements. That undermines the protection of attorney-client privilege and may in some cases actually result in complete loss of it. Thus, auditors increasingly become the target of subpoenas for information in litigation of corporations audited by them. The impact on attorney work product immunity is at this point less clear as that issue is working its way through two federal circuit courts and other circuits are split. In that context, an amendment to SFAS No. 5 needs to be correlated with audit standards making it clear that a determination by a corporation under this exemption not to disclose information either in its financial statements or even to the auditors does not itself justify qualification of an audit report.

8. *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?*

No. Aggregating the disclosures at a level higher than the nature of the contingency may still not protect corporations from prejudice in litigation. Even if a corporation just needs to disclose its "qualitative assessment of the most likely outcome" and the "significant assumptions" underlying that assessment for its cases as a group, the corporation's adversaries may still be able to link the disclosure to a particular case or subset of cases. Sophisticated users of financial statements may still be able to decipher from the disclosure which cases are more significant and which are not, circumventing the aims of the exemption. Moreover, for many corporations, especially smaller ones, a single case may constitute the entirety of its claims, negating the potential camouflage provided by the exemption.

Furthermore, the Board's "rare instances" exemption may still prove inadequate. Instances in which protections of attorney-client privilege and/or attorney work product immunity are not a matter of statistical chance: they arise when requests for disclosure are received. Though this second step allows a defendant corporation to forego disclosure of a qualitative assessment, it still must disclose the amount of the claim or make an estimate of the likely maximum loss exposure and describe the factors that will likely affect the outcome of the matter. Such disclosure not only runs into the accuracy issues discussed above, but will still give savvy adversaries enough information to prejudice the corporation. Also, as a pragmatic concern, the Board's express caution that the exemption be used only in "rare" circumstances may defeat its very purpose by deterring risk-averse corporations and their accountants from utilizing the exemption at all. In the alternative, the exemption may become the rule.

9. *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 draft 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?*

   Yes. The Board's prudent decision to avoid further narrowing the prejudicial exemption ensures that the problems highlighted above in comment 7 are not exacerbated. An even more narrow exemption of "extremely" is difficult to qualify and quantify precisely. Given that the draft amendment already threatens to heavily burden corporations, adopting "extremely rare" language, similar to IAS 37, can only further cripple these corporations by elevating disclosure to unreasonable heights.

10. *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?*

    Yes, for all the reasons discussed above.

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

    If the draft amendment is adopted, we believe that corporations will incur significant expense and management effort to comply with the disclosure requirements, regardless of whether they are quarterly or annually. Due to the significant expense and management effort to comply we would propose that the tabular reconciliation be limited solely to annual reporting periods. For interim periods we would propose that tabular reconciliation only be required if there has been a material change from the information presented in the annual presentation. We believe that this is consistent with other disclosures required of public reporting entities regarding legal proceedings. The instruction to Part II, Item 1 "Legal Proceedings" of Form 10-Q states: "A legal proceeding need only be reported in the 10-Q for the quarter in which it first became a reportable event and in subsequent quarters in which there have been material developments."

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

    No. For the reasons discussed above, we believe that the draft amendment already exceeds that which should be disclosed.

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

No. Given the fundamental shift in disclosure obligations presented by the draft amendment, we strongly believe that the implementation should be delayed until the amendment can be further examined and evaluated. In this regard, we suggest a multi-disciplinary approach to fully examine the impact that the draft amendment will have upon defendant corporations, investors and our judicial processes. In connection with any implementation there should be clear guidance which corporations, their counsel and independent registered public accounting firms can rely upon.

CONCLUSION

For the reasons discussed above, we strongly urge the Board to abandon the draft amendment. At a minimum, the Board should delay implementation until such time as a multi-disciplinary group can fully examine the impact that the draft amendment will have upon defendant corporations, investors and our judicial processes. Our strong belief is that the draft amendment would result in increased compliance costs, subject defendant corporations to heightened litigation risks, and dramatically alter the amount of information available to plaintiffs, all without significant benefits to investors and the users of financial statements.

Sincerely

COOLEY GODWARD KRONISH LLP

John T. McKenna

The following companies have signed this letter to show their concern regarding the draft amendment, recognizing that they may not agree with all the positions taken herein.

Karen O. Cottle, Esq.
Senior Vice President, Corporate Secretary and General Counsel
Adobe Systems Incorporated

Joseph J. Sweeney, Esq.
Senior Vice President, General Counsel and Corporate Secretary
Applied Materials, Inc.

Andrew A. Sauter
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Tyler Wall, Esq.
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Michael J. Rider, Esq.
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Callaway Golf Company

Peter S. Norman
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Chordiant Software, Inc.

C. Evan Ballantyne
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