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LETTER OF COMMENT NO. 213

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via email: director@fasb.org

Mr. Russell G. Golden
Technical Director
Financial Accounting Standards Board
401 Merritt 7
PO Box 5116
Norwalk, CT 06856-5116

Re: File Reference No. 1600-100: Proposed Statement, "Proposed Statement of Financial Accounting Standards, Disclosure of Certain Loss Contingencies, an amendment of FASB Statements No. 5 and 141(R)" (the "Proposed Statement")

Dear Mr. Golden:

On behalf of the Superfund Settlements Project ("SSP"), the RCRA Corrective Action Project ("RCAP"), and the American Chemistry Council ("ACC") (hereinafter collectively the "Commenters"), this letter provides the comments of the Commenters and their members on the above referenced Proposed Statement.

The SSP and the RCAP have worked since their formation in 1986 and 1987, respectively, to provide constructive input to federal agencies on critical policy issues affecting the cleanup of contaminated sites. The members of SSP and RCAP each have extensive experience in addressing these problems. As just one indicator of the scope of that experience, the members of the SSP alone have spent over $6 billion in the investigation and remediation of contaminated sites since the federal waste cleanup programs began.

The ACC represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $664 billion enterprise and a key element of the nation's economy.

The members of the ACC have also spent billions of dollars on the cleanup of contaminated sites.

The Commenters support the FASB's goals of requiring entities to "provide disclosures that assist users of financial statements in assessing the likelihood, timing and amount of future cash flows associated with loss contingencies that are (or would be) recognized as liabilities in a statement of financial position." We believe, however, that the Proposed Statement would not accomplish that goal. Rather, we believe that the proposed amendments would require disclosures of dubious materiality and reliability, while harming the disclosing entity's ability to minimize or eliminate such loss contingencies.

As discussed more fully below, the proposed disclosures would require, in many cases, quantitative and qualitative disclosures that would not be material to investors because they would often be based on pure speculation and thus would be unreliable. Disclosing entities would need to explain why the disclosures were not reliable so that investors would not be misled. Such explanations would likely be lengthy, might confuse investors and would not enable investors to better assess the likelihood, timing and amount of future cash flows associated with loss contingencies. In our view, the proposal to require such disclosures with respect to environmental remediation liabilities is in sharp contrast to AICPA Statement of Position 96-1, "Environmental Remediation Liabilities" ("SoP 96-1"), which recognizes the difficulties in assessing environmental remediation liabilities.

Furthermore, the proposed amendments would require disclosure of information that has been protected by our nation's long-standing attorney-client and work product privilege doctrines and could be used by claimants to adversely affect entities' defense of claims. These harms would not be offset by any benefits of the disclosures to users. Moreover, these harms would not be eliminated or even reduced by the proposal to permit aggregation of loss contingency disclosures and reliance on the prejudicial exemption. We believe that claimants would be able to discern meaningful information about particular loss contingencies from these disclosures, particularly when an entity is small, or has very few material claims, notwithstanding aggregation or reliance on the prejudicial exemption.

The FASB may believe that adoption of the amendments proposed in the Proposed Statement would facilitate convergence of Statement of Financial Accounting Standards No. 5 ("SFAS 5"), as amended, with the International Accounting Standard 37, "Provisions, Contingent Liabilities and Contingent Assets" ("IAS 37"), the International Accounting Standards Board's comparable accounting standard included among the International Financial Reporting Standards ("IFRS"). We believe, however, that the private litigation and regulatory compliance systems in the United States and those of the countries that have adopted IFRS (the "IFRS countries") differ too much to require the same level of disclosure about litigation, threatened litigation, environmental remediation liabilities and regulatory compliance contingencies. The costs to U.S. entities of such increased disclosures about potential legal liabilities would greatly exceed those to entities

in the IFRS countries. Disclosing entities face far more lawsuits and threatened lawsuits in the United States than entities face in the IFRS countries. These cases expose disclosing entities in the United States to far higher losses. According to the United States Supreme Court, punitive damages in the United States are higher and more frequent than anywhere else in the world.[1] In addition, disclosing entities must comply with a larger number of laws and regulations in the United States than exist in the IFRS countries and face more diligent enforcement of our laws and regulations than entities face in the IFRS countries.

We discuss these and other views on the Proposed Statement and respond to several of the FASB's questions in the Proposed Statement below.

A. Discussion of Our Views

The proposal to require disclosure of the amount of the claim would result in difficult judgments when the claim has not been asserted publicly and interfere with government approval processes.

Unless a claim has been asserted publicly, an entity may not be sure whether an amount asserted by a claimant is a serious claim or not or whether the person who made the assertion was speaking on behalf of the claimant. Therefore, determining when to disclose a claim amount that has not been included in a filed document and is not otherwise objectively calculated is likely to require difficult judgments.

With respect to government proceedings, we think that the proposal also would be inappropriate because it would require disclosure of amounts suggested by government officials prior to the approval of the resolution of the proceedings by the appropriate supervisory official. For example, disclosure of a possible settlement amount advanced by a government official before the appropriate authoritative body had approved the amount would be inconsistent with the government's approval process.

The proposed amendments would require disclosure of information that is not material to investors.[2]

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1 Exxon Shipping Company v. Baker, 128 S. Ct. 2605, 2623 (2008).

2 As a threshold matter, we recommend that, if the FASB adopts the Proposed Statement notwithstanding our opposition, it clarify how the legend at the end of the proposed statement, which states that "[t]he provisions of the Statement need not be applied to immaterial items," would be implemented under the proposal. We recommend that any final statement state clearly that the materiality of loss contingencies should be evaluated individually and not on an aggregate basis, except to the extent that they are related, and the disclosure requirements do not apply to (a) a loss contingency regarded by the disclosing entity as being immaterial based on either the amount of the claim or the disclosing entity's assessment of the amount of the reasonably possible

The proposed amendments would require disclosure about loss contingencies, including any contingencies relating to unasserted claims, when the likelihood of loss is considered to be remote if the contingency is "expected to be resolved in the near term" and "could have a severe impact" on the entity. We believe that disclosure about loss contingencies that are regarded as having a remote likelihood of resulting in a loss to a disclosing entity would not provide material information to investors. In addition, requiring disclosure about a contingency that is remote would not be consistent with the Supreme Court's view in Basic, Inc. v. Levinson, 485 U.S. 224, at 238 (1988), that "with respect to contingent or speculative information or events . . . materiality 'will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event'" (citing SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2nd Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969)). If this proposal stems from a view that disclosing entities are concluding unreasonably that the likelihood of a loss is remote, SFAS 5 should be enforced, not amended.

The proposed amendments would require disclosure of amounts that cannot be calculated with any degree of precision and are likely to be unreliable.

The proposed amendment would require disclosure of an entity's maximum exposure to loss when the entity cannot disclose the amount of the claim. We believe that disclosure of the maximum exposure to loss would not provide material information to investors because calculation of such amount, particularly in the early stages of consideration of a claim, would be highly speculative. In the early stages of an analysis of a claim, whether it is threatened litigation or the remediation of a recently identified Superfund site, an entity will have very little basis to make a reasonable estimate of the maximum exposure to loss. Accordingly, the disclosed amount would not be reliable.

The calculation of a loss resulting from litigation requires the assessment of many factors, including facts that are unknown prior to discovery, the strength of any defenses and many legal procedural issues. These procedural issues include, for example, whether a class action would be sustained, whether particular evidence will be admissible and whether allegations will be dismissed. In addition, estimating the damages that a court or jury may award is very subjective. The Supreme Court has noted that the amount of a punitive damages award is particularly

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loss or (b) an unasserted claim, unless it is probable that the claim will be asserted and reasonably possible that, if asserted, the disclosing entity would have a material loss. We oppose the proposal to change the standard with respect to unasserted claims from "reasonably possible" to "more than remote" given the recent experience with such a formulation by the Public Company Accounting Oversight Board in the definition of material weakness in Auditing Standard No. 2 relating to audits of internal control over financial reporting.

unpredictable.[3] Despite the existence of limitations in many states on the amounts of punitive damages, juries have considerable leeway in awarding punitive damages because the bases for punitive damages are generally retribution and deterring harmful conduct. Finally, predicting how an appeal might affect a court or a jury award can be impossible. Damage awards arising from litigation can change drastically and unpredictably on appeal, as is evidenced by the Supreme Court's recent decision to reduce the punitive damages award relating to the Exxon Valdez grounding from $2.5 billion to $507.5 million.[4]

The calculation of a loss resulting from environmental remediation may be impossible at the early stage of the identification of a specific site. SoP 96-1 identifies the following costs as required to be included in the loss measurement:

- Costs of compensation and benefits for those employees expected to devote a significant amount of time to the remediation effort.
- The cost of a remedial investigation/feasibility study ("RI/FS") and preparation of a remedial action plan and remedial designs for a Superfund site, or the performance of a Resource Conservation and Recovery Act of 1976 (RCRA) facility assessment, RCRA facility investigation or RCRA correction measures studies.
- Fees to outside law firms for work related to determining the extent of remedial actions that are required, the type of remedial actions to be used or the allocation of costs among potentially responsible parties ("PRPs").
- Fees to outside engineering and consulting firms for site investigations and the development of remedial action plans and remedial designs.
- Costs of contractors performing remedial actions.
- Government oversight costs, past costs and enforcement-related costs.
- The cost of machinery and equipment used in the remedial actions when such machinery and equipment have no alternative use.
- Assessments by a PRP group covering costs incurred by the group in dealing with the site.
- Costs of operation and maintenance of the remedial action under Superfund, corrective actions under RCRA and analogous actions under state and non-United

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3 Exxon Shipping Company, 128 S. Ct. at 2625 ("The real problem, it seems, is the stark unpredictability of punitive awards").

4 The Supreme Court reduced the $2.5 billion punitive damages award to $507.5 million by crafting a new common law rule for punitive damages in maritime cases. The original punitive damages in the case, awarded by a jury in 1994, were $5 billion, but this figure was later reduced to $2.5 billion by an appellate court. At any point in the almost two decades of litigation, it would have been nearly impossible to foresee the final punitive damages amount.

> States laws, including the costs of postremediation monitoring required by the remedial action plan.

The calculation of each of those costs requires an assessment of facts that are often only known to the disclosing entity when the RI/FS, facility assessment or investigation or corrective measures study is nearing completion and thereafter as a remedial plan is developed. In addition, the calculation of an entity's share of those costs requires consideration of the number and financial condition of the other PRPs and the terms of an agreement among the PRPs as to the allocation of liability, which may not be known at the early stage of the consideration of a remediation obligation.

Appendix B of SoP 96-4, "Remediation Liability Case Study," illustrates the difficulties of estimating a reasonable loss with respect to a Superfund site in light of all of the relevant factors. Notwithstanding an entity's conclusion that it had contributed hazardous substances to a site, the case study acknowledges that the entity might be unable to estimate a range of cost of the overall remediation effort prior to the substantial completion of an RI/FS. The case study discusses an entity that received information that it was a PRP in 1986 but, "[b]ecause of a lack of information about the type and extent of remediation effort that could be required, **no range of cost of the overall remediation effort could be developed** [emphasis added]" prior to the substantial completion of the RI/FS in 1991. In light of the lack of information, the case study describes (a) the recognition by the entity of its share of the cost of the RI/FS, once the PRPs agreed to conduct the RI/FS, (b) the updating of that amount over time to reflect the increasing costs for the RI/FS and additional information about the entity's share of the cost, and (c) the estimation of the possible remediation cost upon the substantial completion of the RI/FS. Given the lack of information until an RI/FS is substantially completed, we can't imagine how a disclosing entity would be able to calculate the maximum exposure to loss for many, if not most, Superfund sites. If, nevertheless, the entity were required to disclose an amount, that amount would be highly speculative and unreliable.

The Proposed Statement does not address how a company would calculate its maximum exposure at an environmental remediation site when its consultants, or the United States Environmental Protection Agency's ("EPA's") consultants, recommend alternative remediation plans that involve very different costs and when there are other PRPs. For example, assume that alternative remedies are set forth in an RI/FS: One remedy involves long-term groundwater monitoring coupled with natural attenuation- estimated costs of $1 million. A second possible remedy involves extensive soil excavation, incineration of the waste mass and a groundwater pump and treat system at an estimated cost of $500 million. The reporting company is a participating PRP because the reporting company has agreed to pay an allocable share of the remediation costs. Among the other participating PRPs are two companies that have disclosed in recent SEC filings uncertainties stemming from changes in their business. In addition, there are other potential PRPs that have not agreed yet to pay an allocable part of the remediation costs. A

reasonable interpretation of the Proposed Statement might lead the reporting company to use the $500 million remediation plan to estimate its maximum exposure to loss even though the PRP group is likely to advocate the EPA's selection of the $1 million remediation plan or the EPA has not yet selected the remedy in its Record of Decision. In addition, the company may conclude that it needs to include in the maximum exposure to loss the entire $ 500 million (joint and several liability is one of many possible outcomes), notwithstanding the fact that SoP 96-1 would permit it to exclude from any recognized amount the allocable share of the damages to be paid by the participating PRPs, except to the extent that the company concludes that a PRP will not pay its share. If the company includes in its maximum exposure to loss the entire $500 million, it would probably need to include disclosure about the $1 million remediation plan, the participating PRPs, including the potential financial difficulties of the two participating PRPs, and the existence of potential other PRPs. It is unclear to us whether this extensive disclosure would be in the best interests of investors. In any event, we don't believe that this extensive disclosure would enable investors to better assess the likelihood, timing and amount of future cash flows associated with loss contingencies.

Disclosure of any amount recognized in the financial statements and the amount of the claim or the maximum exposure to loss would likely lead to additional disclosures, which might confuse investors.

The proposal to require entities to disclose the amount of the loss recognized in the financial statements and the amount of the claim, if known, or the maximum exposure to loss if the claim amount is not known would likely confuse investors. An entity would probably determine that it needed to explain why the amount that it had recognized in the financial statements differed from the amount of the claim or the maximum exposure to loss. In addition, since plaintiffs tend to use greatly inflated numbers to the extent that they attempt to quantify claims in a complaint, the disclosing entity would want to explain that the claim is significantly higher than what the plaintiff likely expects to receive. Similarly, an entity that discloses an amount of its maximum exposure to loss would likely want to explain to investors that the maximum exposure to loss is likely higher than what the entity expects to lose. These explanations may confuse an investor, who is likely to wonder why the amounts are being disclosed if they are not representative of the entity's expected loss. To avoid that investor confusion, the entity might choose to disclose, pursuant to proposed paragraph 7.a., its "best estimate of the possible loss or range of loss" because it believes "that the amount of the claim or assessment or the maximum exposure to loss is not representative of the entity's actual exposure." An investor would then have to figure out which of either two or three numbers it should rely on, the amount of the claim or the maximum exposure to loss, the best estimate of the possible loss or range of loss or the amount recognized by the entity in its financial statements. The disclosure of three different amounts likely will suggest a precision to the calculation that would be extremely misleading given the subjective and unpredictable nature of the estimates.

In addition, the explanations about each of the disclosed amounts likely would not help investors assess the likelihood, timing and amount of future cash flows associated with the loss contingencies. In many, if not most, cases, disclosing entities cannot predict the timing or the outcome of the resolution of loss contingencies. That timing is to a great extent outside of the control of the entity unless it is willing to agree to whatever the claimant wants. Such capitulation would generally not be in the best interests of an entity's shareholders.

The proposed requirement to calculate the maximum exposure to loss would be costly and burdensome.

The effort to calculate the maximum exposure to loss could be costly because of the need for a disclosing entity to hire specialists, including its outside counsel, to assist with the development of the facts and analysis necessary to calculate the amount. The costs and burdens would be even greater when the loss contingency is identified near the time when the company is required to file its interim or annual financial statements. To avoid filing its financial statements late, the entity would likely be required to engage even more specialists to assist it.

Disclosure of an amount of an entity's maximum exposure to loss would expose an entity to risks.

To the extent that the disclosed amount of the maximum exposure to loss did not take into account facts that were available to the entity at the time the estimate was made but were only discovered after the disclosure was made, the entity might need to restate its financial statements to correct the amount of the maximum exposure to loss. This risk would be exacerbated if the loss contingency were identified near the time when the company filed its interim or annual financial statements.

The amount of the maximum exposure to loss would likely change over time, as the entity learns more facts or the litigation or government investigation progresses. Changes in the estimate would expose the disclosing entity to risk of liability with respect to the earlier disclosed amount.

These risks and the risks to liability resulting from the other proposed disclosure are complicated by the fact that the proposed disclosures would be included in the notes to an entity's financial statements. The financial statements, including the disclosures in the notes to the financial statements, are not entitled to the safe harbor protections for "forward-looking statements" in Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934, as amended.

The proposed amendments would require disclosure of information that has been protected by our nation's long-standing attorney-client and work product privilege doctrines.

In addition to the previously discussed quantitative information, the proposed amendments would require qualitative disclosures about the factors that are likely to affect the ultimate outcome of the contingency, along with their potential effect on the outcome, the company's assessment of the likely outcome of the contingency and the company's significant assumptions in estimating the maximum exposure to loss or the possible loss or range of loss if a company chooses to disclose its best estimate of the possible loss or range of loss to explain why it does not believe that a known claim or the estimate of the maximum exposure to loss is representative of the company's actual exposure. To make any of these disclosures about loss contingencies, particularly pending and threatened litigation and regulatory matters, including environmental remediation liabilities, an entity would likely need to consult its counsel. The outside counsel engaged to assist the company address the claim is likely to provide guidance on factors that the company should take into account in calculating the maximum exposure to loss or the best estimate of the possible loss and in assessing the ultimate outcome of the contingency.

This type of guidance is precisely the type of guidance that has been protected from disclosure to third parties by the attorney-client and work product privilege doctrines. These privileges, which are integral to our judicial system, are believed to encourage open and candid communication between attorneys and clients and to promote compliance with the law.

Given existing auditing standards[5], it is highly likely that the entity's auditor would need to obtain evidential support for an entity's disclosures about its loss contingencies from the entity's counsel and the strength of its defenses. The provision of such support to the entity's auditor by its counsel would adversely affect the entity's ability to protect from disclosure to the claimant information that would otherwise be protected by the attorney-client and work product privileges. The potential loss of these privileges might result in an entity's decision not to confide in its counsel, which would adversely affect the entity's ability to address the claim and would also adversely affect the reliability of any estimate of the entity's possible or probable loss associated with the loss contingency. Alternatively, an entity might engage an outside valuation expert to assist it in estimating the maximum exposure to loss to avoid the loss of privileges. Such a valuation might be of dubious value to investors because it would not be based on the views of counsel as to the merits of the claim.

The proposed amendments would require disclosure of information that could be used by claimants or others to adversely affect an entity's ability to reduce or eliminate any ultimate loss.

Disclosure of the quantitative and qualitative disclosures proposed in the Proposed Statement,

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[5] AU Section 326, "Evidential Matter," adopted also by the Public Company Accounting Oversight Board for public companies as part of its interim auditing standards on April 16, 2003.

including the disclosure of the amount of any recognized reserves and the reconciliation of the recognized amount as of the beginning of the period to the end of the period, would also adversely affect an entity because it would provide to claimants information that would advantage them with their claim. In our experience, claimants often do not assert an amount of a claim, which would result under the Proposed Statement in the requirement that the entity disclose its maximum exposure to loss. Such disclosure would facilitate the calculation by the claimant of an amount of its claim and would likely set a minimum amount for any settlement of the claim. Furthermore, the disclosure would likely force settlements of cases that otherwise would await resolution in the normal course of the proceeding.

The proposal to require disclosure of the amount accrued with respect to individual loss contingencies[6], and provide a reconciliation of the total amount recognized at the beginning of the period to the amount at the end of the period, with separate disclosures about increases and decreases in previously recognized loss contingencies and about recoveries, would provide a roadmap to claimants as to an entity's views of the likelihood of its success with respect to the claim and would unfairly and inappropriately enhance claimants' likelihood of success. This adverse impact would not be offset by any benefit to investors because of the judgmental nature of the estimates of amounts to be accrued and the number of subjective and unknown factors that affect such an estimate.

The proposed disclosures about insurance and indemnification arrangements, which would likely be difficult to prepare in the early stages of a claim, might adversely affect a company's ability to enforce such arrangements.

Finally, we believe it could be extremely harmful if disclosure was required about remote loss contingencies that are expected to be resolved in the near future and could have a severe impact on the entity. Such disclosure could enable a claimant to assert a claim that it would not otherwise have asserted because, for example it only became aware of the claim prior to the expiration of a statute of limitation by reading the disclosure.

The ability to aggregate disclosures and the prejudicial information exemption would not likely eliminate the harm from the proposed disclosures.

It is unclear how the aggregation of disclosures would be implemented, including with respect to different types of loss contingencies, such as environmental remediation sites at various stages of investigation or remediation, given the proposals to require qualitative disclosures about, among other things, the "significant assumptions made by the entity in estimating the amounts disclosed in paragraph 7(1) and in assessing the most likely outcome." Nevertheless, we believe that such

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[6] This would provide significantly more information to claimants than under current practice, since SFAS 5 requires disclosure of the accrued amount only if material to investors.

aggregation would not alleviate our concerns. Aggregation would be particularly unhelpful to an entity that has only a few claims, such as a few lawsuits or other proceedings or a few sites giving rise to environmental remediation liabilities, or that has particularly material claims. Notwithstanding aggregation of claims, we believe that the disclosure required by the SEC pursuant to Item 103 of Regulation S-K, together with the disclosures that would be required by the proposed amendments, would enable claimants to deduce damaging information about their particular claims. Item 103 of Regulation S-K requires entities to "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, . . .any proceedings known to be contemplated by governmental authorities" and any ordinary routine litigation that "departs from the normal kind of such actions." The required disclosure is "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."

For similar reasons, we believe that the prejudicial information exemption would not alleviate our concerns. Moreover, the statement that disclosure would be prejudicial in only "rare instances" might result in a conclusion by an entity's auditors that the exemption is available in far fewer situations than the disclosing entity believes are necessary. Finally, since the exemption would be inapplicable to the requirements that a disclosing entity disclose the amount of the claim or assessment against the entity, an estimate of the entity's maximum exposure to loss if no claim amount is asserted and the factors that are likely to affect the ultimate outcome of the contingency along with the potential impact on the outcome, we believe that the exemption does not go far enough.[7]

B. Responses to Certain of the FASB's Questions

Question: What costs do you expect to incur if the Board were to issue this proposed Statement in its current form as a final Statement?

Response: We expect that adoption of the proposed Statement would result in the following costs to disclosing entities:

- costs in taking the time each period when the disclosures are required to identify the factors relevant to the estimate of the maximum or possible loss, to consult with

[7] We note that the prejudicial information exemption in IAS 37, when available, would likely be more effective because of the types of disclosure required by IAS 37.

specialists including counsel with respect to the estimate and to estimate and prepare the required disclosures;

- costs resulting from late SEC filings because of the need to analyze claims made shortly before SEC filings are required to be filed, including defaults on loan covenants, stock exchange delistings and shareholder suits;
- costs resulting from a decrease in the strength of the disclosing entity's negotiating position, resulting in higher settlement costs;
- costs resulting from the need for disclosing entities to explain the limitations of the disclosed estimates and the reasons for changes in the estimates;
- potential costs resulting from further litigation claiming the estimates were not reasonable or fully or adequately discussed; and
- costs resulting from the loss of the attorney-client privilege.

In addition, as noted above, the proposal to require disclosure of an estimate of the maximum exposure to loss could lead to restatements of the financial statements, which are costly and confusing, to correct an erroneous estimate made without taking into account evidence available at the time the estimate was made but only identified by counsel or others much later.

Given these costs of the proposed disclosures and the absence of the FASB's articulation of any compelling need by investors for this information, we oppose the adoption of the Proposed Statement.

Question: 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?

Response: As noted above, we do not believe that this change would improve disclosure. Merely including quantitative information that has been estimated based upon very subjective, non-economic factors that change during the course of the resolution of the contingency would not provide reliable information to investors and would require the disclosing entity to explain the arbitrary nature of the estimate, potentially confusing the reader as to why the number is disclosed when it is so unreliable. Moreover, we question the implicit conclusion by the FASB that investors need quantitative information, regardless of the imprecision and variability of the

assumptions underlying the information. Unless quantitative information is reliable, its disclosure is more confusing than helpful.

Question: 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?

Response: As discussed above, in many cases, if not most cases, a disclosing entity will not be able to provide a reliable estimate of the maximum exposure to loss when a claimant has not publicly specified a claim amount because the disclosing entity will not know what damages the plaintiff will ultimately assert publicly or what damages the entity will identify as it investigates the claim, particularly a claim relating to environmental remediation, as discussed above.

Question: 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?

Response: Once a disclosing entity makes a settlement offer, the disclosing entity must consider the impact of that offer on the amount recognized in its financial statements, and existing FAS 5 would require disclosure of the amount recognized when material. We agree with the Board's decision not to require disclosure about settlement offers in all cases in light of the fluidity of the settlement process. Moreover, we do not believe that such disclosure would provide additional useful and reliable information to investors.

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?

Response: We do not believe that the tabular reconciliation would provide useful information for assessing future cash flows because the presentation would not enable investors to predict when any cash would be spent. The amounts accrued are not predictive of the timing of cash ouflows. The MD&A is the better vehicle for disclosing entities to discuss uncertainties that may impact cash flows in the future. The SEC should seek to enforce existing requirements of the MD&A if it believes that disclosing entities are not properly warning investors of future cash flow changes.

Moreover, the SEC previously considered and determined not to require such a reconciliation. In Securities Act Release No. 7793 (January 21, 2000), the SEC proposed to require disclosure of the beginning and ending balances of major classes of valuation or loss accrual accounts as well

as the amounts of additions charged to expense and deductions/other additions during the period and descriptions of the nature of any changes in the assumptions used in estimating the amounts. The proposal listed twelve types of valuation or loss accrual accounts, including allowance for doubtful accounts or notes receivables, liabilities for environmental costs, product warranty liabilities and probable losses from pending litigation. Notwithstanding the proposal to permit the aggregation of all pending litigation, most of the commentators opposed the proposal. Among other things, commentators noted that the proposed disclosures would jeopardize the attorney-client privilege and adversely affect a disclosing entity's ability to defend itself in litigation and in disputes with government agencies. Some of the comments made on that proposal include the following:

- "First, allowing a third party to know that a company has a loss accrual recorded could be interpreted as an admission of liability by the company. Second, allowing a third party to know the amount that the company has recorded for a loss accrual would effectively sabotage a company's settlement posture. Such disclosure would mean that what a company considered the endpoint of settlement negotiations would become the starting point. Thus the proposal would provide a strong incentive for a company to accrue the lowest possible number. The proposal could have the opposite [effect] of what was intended; accruals could become less accurate."[8]
- "In our view, it will not be practicable for companies to disclose gross movements in individual categories of reserves without giving away proprietary information or increasing the risk of nuisance suits. . . Disclosed increases or decreases in legal . . .or environmental reserves could reveal a company's negotiating plan [or] litigation strategy . . . to financial interested parties who could benefit from such disclosure at the expense of the company's shareholders. This type of information would normally be protected by attorney-client privilege."[9]
- "Disclosures about litigation can be very difficult because of their extreme sensitivity in the current litigious environment. There is always a balance between providing financial statement users with relevant information and at the same time not revealing confidential strategies or expected settlement benchmarks, the disclosure of which could be injurious to shareholders."[10]

Question: The International Accounting Standards Board (IASB) continues to deliberate changes to IAS 37, "Provisions, Contingent Liabilities and Contingent Assets," but has not yet

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8 Comments of Margaret M. Foran, Chairman, Securities Law Committee, American Society of Corporate Secretaries, Inc. (April 14, 2000).

9 Comments of Philip D. Ameen, Chairman, Financial Executives Institute (April 19, 2000).

10 Comments of D. D. Humphreys, Vice President and Controller, Exxon Mobil Corporation (April 17, 2000).

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?

Response: Since we believe that the circumstances when disclosure would be prejudicial in the United States are more frequent than the word "rare" suggests, we would be totally opposed to the "extremely rare" standard in IAS 37, which, no doubt, is influenced by the far less litigious and less strict regulatory compliance environment outside the United States. We believe that disclosing entities should be able to judge for themselves the prejudicial impact of any required disclosure without worrying about whether their ability to exclude such detailed information is consistent with the "rare" standard.

Question: 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?

Response: We do not believe that the tabular reconciliation should be required either annually or on an interim basis but an interim period reconciliation would be particularly harmful to a disclosing entity's ability to revise reserve estimates based on changes in its analysis of the merits or likely success of the claim. The presentation of such detailed information about changes in the recognition of reserves relating to loss contingencies would seriously undermine a disclosing entity's ability to defend itself from claims. Aggregated disclosure would not protect a disclosing entity that has only a few lawsuits and government or other regulatory proceedings or that recognizes significant reserves related to material lawsuits and other proceedings. Claimants would learn information that they could use to a disclosing entity's disadvantage in litigation and other proceedings.

Question: 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?

Response: We think that the FASB's time frame for considering this area is much too short. We believe that this effective date would not provide the FASB with sufficient time to field test the proposed disclosure requirements before imposing them. Such field testing should be done so that the FASB can better assess the reliability of the loss estimates and the usefulness of the proposed qualitative disclosures. In addition, given the complexity of estimating the maximum exposure to loss and evaluating the disclosures that would be consistent with the provisions requiring qualitative disclosures, entities would need more time to prepare the required disclosure if the proposed Statement is adopted.

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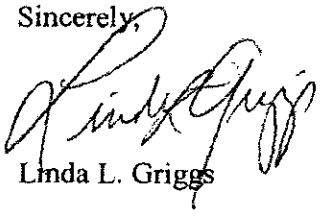
We appreciate the opportunity to submit these comments. Please feel free to contact the undersigned with any questions regarding the views expressed in this letter. We would be pleased to participate in a public roundtable meeting.

Sincerely,



Linda L. Griggs

Counsel to the Commenters