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August 7, 2008

Technical Director  
Financial Accounting Standards Board  
401 Merritt 7  
Norwalk, CT 06856-5116



LETTER OF COMMENT NO. 76

Re: Comments to Proposed Statement of Financial Accounting Standards, Disclosure of Certain Loss Contingencies, an Amendment of FASB Statements No. 5 and 141(R)

Dear Sir or Madam:

I submit these comments in response to the Exposure Draft (File Reference No 1600-100), Proposed Statement of Financial Accounting Standards, Disclosure of Certain Loss Contingencies, an Amendment of FASB Statements No 5 and 141(R), issued by the Financial Accounting Standards Board on June 5, 2008 (the "Exposure Draft").

By now you have undoubtedly received numerous comments to the Exposure Draft. In particular, you received comments from Thomas J. Dusterberg, President and Chief Executive Officer of Manufacturers Alliance/MAPI, dated August 5, 2008. Oshkosh Corporation shares the views and concerns expressed by Mr. Dusterberg. Rather than repeat those comments, I have attached them for your reference.

Oshkosh Corporation strongly believes that any benefit that might be gained by the proposed additional disclosures is far outweighed by the burden, cost and unintended consequences they would bring about. We appreciate the opportunity to provide our comments to the Exposure Draft. Thank you for your attention to this matter.

Sincerely,

Patrick L. Breen  
Associate General Counsel—Litigation

Enclosures



**Manufacturers  
Alliance/MAPI**  
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August 5, 2008

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File Reference No. 1600-100

Dear Sir or Madam:

Re: *Comments of the Manufacturers Alliance/MAPI Inc., to Proposed Statement of Financial Accounting Standards, Disclosure of Certain Loss Contingencies, an Amendment to FASB Statements No. 5 and 141(R)*

### Background

The Manufacturers Alliance/MAPI Inc. (Alliance or MAPI) is submitting these comments in response to the Exposure Draft (File Reference No. 1600-100), Proposed Statement of Financial Accounting Standards, Disclosure of Certain Loss Contingencies, an amendment of FASB Statements No. 5 and 141(R), issued by the Financial Accounting Standards Board on June 5, 2008. We appreciate the opportunity to express our concerns. Before turning to those concerns, I would like to share some information about the Alliance and the nature of its membership, programs, and services. Founded in 1933, MAPI serves as a forum for the frank exchange of knowledge about leadership, management practices, and the global marketplace. As an alliance, we bring together senior executives to share expertise and to learn from one another. As a nonprofit business league, we engage in economic and policy research, benchmarking studies, and continuing professional education. As a spokesperson for our members, we advocate public and management policies that help foster continuing economic progress and a stronger, more efficient business sector.

Our some 550 corporate members are leading U.S.-based and international companies in manufacturing and related business services in such industries areas as: electronics, aerospace, automotive, information technology, precision instruments, pharmaceuticals, chemicals, and energy. MAPI research and meeting activities focus on management, economics, and law, with an emphasis on issues critical to overall economic growth, innovation, free trade, productivity gains, and excellence in corporate management.

Some of the ways we accomplish our mission and serve our membership include:

#### Executive Committee

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Steven H. Wunning, Group President  
Caterpillar Inc.

- Nearly 2,200 senior executives from our member companies use our *Executive Council* program—knowledge networks covering more than 20 corporate disciplines, including Councils for senior corporate financial and legal officers—for frank discussions among peers, real-time benchmarking, continuing education, and exchanging innovative ideas and practices. The Alliance also conducts ad hoc conferences and other business sessions on specialized issues of concern to our members.
- The *Research* program provides authoritative insight through member-driven projects—benchmarking surveys, economic and regulatory analyses, policy briefs, management studies, legislative and executive branch updates, books, and hot-topic alerts via e-mail.
- Our *Economic Forecasting* service utilizes the widely respected Global Insights econometric models with selected assumptions provided by MAPI economists to forecast the manufacturing environment in the domestic and select international markets.
- As part of our comprehensive *communications* program, the Alliance is called on frequently by the media, opinion leaders, and corporate executives for expert commentary on the latest economic data or to react to evolving news stories. We are often cited for our original research and analyses and are invited to testify before Congress, the departments and agencies of the federal government, and quasi-governmental entities.

### **Serious Concerns Raised by This FASB Proposal**

The stated rationale behind FASB's proposal is to provide more useful information about loss contingencies to investors and other users of financial information in assessing the likelihood, timing, and amount of future cash flows associated with loss contingencies. With regard to pending and threatened litigation, however, the Manufacturers Alliance believes that the proposed amendments to FAS 5 (and FAS 141 (R)) would, in fact, do little to achieve that end. Moreover, the proposal would have a significant negative impact and impose burdensome costs on the companies that have to comply with its dictates. The specifics of the Alliance's concerns in this regard are detailed below.

#### **Tipping One's Hand in Litigation**

Perhaps the most troubling aspect of this proposal is that it would provide a company's adversaries in court proceedings key insights into its litigation strategy. By requiring disclosure of a company's qualitative assessment of the most likely outcome of the legal action, the anticipated timing of its resolution, and significant assumptions made in estimating the amounts in the quantitative disclosures and in assessing the most likely outcome, the proposal would expose important aspects of a defendant's thinking about a case. This information has traditionally been closely guarded in adversarial proceedings.

Moreover, these disclosures are arguably admissible in evidence against a company in the very litigation that is the subject of the disclosure (e.g., an admission against self-interest). This information, particularly when it is coupled with a quantitative disclosure of a company's maximum potential loss, might well embolden plaintiffs who would see the information as a validation that their claims are being viewed by the defendant as serious and credible. Indeed, in cases where no claim amount has been presented, the disclosure of a company's best estimate of maximum loss exposure would, in effect, set a target goal for the plaintiff. Such disclosures would likely have the effect of frustrating settlement negotiations and/or, potentially, increasing the dollar amounts of settlements and jury verdicts. Unfortunately, many jurors will view a company's best estimate of maximum loss disclosure as an admission of a liability of that magnitude. Additionally, the requirement of disclosure of remote loss contingencies in certain instances could make even dubious claims less likely to settle or be dropped.

### **Illusory Protection of the Prejudicial Exception**

The prejudicial information exception, which FASB asserts will preclude disclosure from being linked to specific litigation, offers no real protection. Notwithstanding permissible aggregation of information, the required qualitative disclosure in all cases of the most likely outcomes and significant assumptions underlying those assessments will afford litigation adversaries insights not otherwise available to opposing counsel because in many instances they will be able to link the disclosure to specific cases or subsets of cases. This is particularly true in situations where a company has a small customer base and/or minimal litigation. In such cases, disclosures will easily be linked to claims.

### **Waiver of Attorney/Client Privilege and Work Product Doctrine Protections<sup>1</sup>**

Because the required disclosures will often be based on confidential communications between a company and its counsel handling the matter in question, it is likely there could be a judicial finding that those disclosures constitute a waiver of attorney/client privilege and/or work product immunity. Additionally, independent auditors are likely to want detailed information from litigation counsel to test a company's qualitative analysis and loss estimates in the course of their work. Providing such information also poses waiver risks. It should be noted that these latter requests from auditors are likely to be broad in nature since those professionals are being put into a position of signing off on matters that they are not always well qualified to evaluate. There is very real danger that, in these situations, auditors will be tempted to substitute their judgment of litigation matters for the professional opinion of counsel.

Risk of these waivers could have a chilling effect on a company's interaction with litigation counsel. Lawyers need to be able to have candid conversations with their corporate clients about the range of possible litigation outcomes and issues. If such communications result in disclosures that might aid a litigation adversary, candor will be inhibited, and tension will develop in relationships between a company and its advisors. Lawyers are likely to grapple with conflicting professional responsibilities (i.e., the duty of confidentiality and the duty of disclosure), and disagreements on disclosure between a company and its lawyers and auditors are bound to arise in the attempt to predict inherently uncertain outcomes.

### **A Spur to Additional Litigation**

Since the assessment of litigation outcomes is an inherently uncertain exercise, FASB's proposed amendments are likely to become a source of securities litigation. Estimates of maximum loss exposure will often prove to be too low or too high, and assessments of the most likely outcome will sometimes be inaccurate. These disclosures will be judged in hindsight and, as such, may well be sources for additional claims and litigation.

One other way FASB's proposal could serve as a basis for increased litigation is the requirement to disclose unasserted claims and assessments. Disclosures of this nature may serve as a "red flag" alerting potential plaintiffs to claims of which they were not previously aware

### **Contradiction Between the Intended Purposes of the Proposal and Its Actual Effect**

At the beginning of this letter, we note that FASB is undertaking this effort in response to expressed concerns by investors and other users of financial information that existing loss

<sup>1</sup> For a detailed evaluation of the current state of the attorney/client privilege and work product immunity, see two relatively recent Manufacturers Alliance/MAPI reports written by Attorney Rae Ann Johnson, *Preserving the Attorney-Client Privilege: New DOJ Policy Essentially Preserves the Status Quo, May Thwart Congressional Solutions*, IAR-480e, January 3, 2007, and *Making the Most of the Attorney-Client Privilege in a Sarbanes-Oxley World*, IAR-469e, January 26, 2006.

contingency disclosure standards do not provide adequate information about certain contingent losses. With regard to litigation, we fail to see how the disclosures contemplated in the FASB proposal address those concerns. As we have noted several times above, litigation assessments are inherently uncertain and the financial outcome of these disputes is virtually impossible to gauge. Moreover, litigation outcomes are often subject to vagaries that are out of the parties' control. Complexities inherent in all major litigation which make these assessments and valuations so difficult and uncertain were emphasized in a recent letter from the general counsels of 13 major U.S. companies to the respective chairmen of FASB and the International Accounting Standards Board when they noted:

... factors (some of which may not be readily known) might include: applicable case law and common law, the venue, the practices of the lawyers involved, the practices of the judge and/or magistrate involved, the current political and media environment, potential outcomes of other companies facing similar litigation, seriousness of the alleged damage, prior settlement amounts, the strength of viable legal theories, the outcome of factual disputes, potential defense costs, the presence of third parties—such as government agencies, etc. And, even after all this time and effort have been invested, a projected outcome is still likely to be inaccurate, especially at the outset of a matter. . . .

The U.S. Supreme Court's recent ruling<sup>2</sup> in the punitive damages case involving the Exxon Valdez oil spill into Alaska's Prince William Sound also highlights the uncertainty surrounding estimates of maximum potential loss. In that case, the Court reduced Exxon's punitive damages—which had originally been set at \$5 billion before being reduced on appeal to \$2.5 billion—to about \$500 million. In the majority opinion, Justice David Souter pointed out the stark unpredictability of punitive damages. This case highlights the fact that awards of punitive damages are so judgmental and subjective that defendants have no economic model for predicting them with reasonable accuracy.

Further complicating this picture is the fact that the United States is by far the world's most litigious environment. The instant proposal would require companies facing a high volume of litigation (some of which might well be frivolous and/or filed in jurisdiction infamous for their pronounced pro-plaintiff/anti-corporate bias<sup>3</sup>) to disclose a plethora of dubious and inherently uncertain information. Such disclosures would only frustrate FASB's stated rationale behind the instant proposal of providing investors and other users of financial statements with better information about loss contingencies.

The point to be made is that FASB's proposed additional disclosure standard would not provide investors and other users of financial statements with reliable information about loss contingencies. These additional disclosures would instead provide those parties with complex and extraneous information that is highly volatile, flawed, and misleading. In turn, this will not assist their understanding of loss contingencies associated with litigation in any meaningful way.

In such circumstances, the instant FASB proposal is hard to reconcile with the Board's own Status of Concepts Statement 1, which sets forth the objectives of financial reporting. Specifically, we point to the provisions of that statement which provide that: financial reporting is intended to provide information that is useful in making business and economic decisions and that such reporting

<sup>2</sup> *Exxon Shipping Co v Baker*, 128 S.Ct. 2605 (June 25, 2008).

<sup>3</sup> See Frederick T. Stocker, *The Silica Scam: Plaintiffs' Lawyers Take a Page From Their Asbestos Playbook in Search of the Next Big Mass Tort Payout, Dubious Claiming Practices, However May Be Denying Traction to Their Cash Bandwagon*, Manufacturers Alliance/MAPI, LAR 471e, February 21, 2006, and Frederick T. Stocker (Ed.), *I Pay, You Pay We All Pay: How the Growing Tort Crisis Undermines the U.S. Economy and the American System of Justice*, Manufacturers Alliance/MAPI, May 2003

should be comprehensible to those who have a reasonable understanding of business and economic activities.

### Conclusion

The FASB proposal commented upon in this letter is the latest, and likely not the last, chapter in a story that began with the high-profile corporate scandals at the early part of this new century. Restoring public confidence in the securities markets has been the goal behind such measures as the corporate governance reforms mandated by the Sarbanes-Oxley Act of 2002,<sup>4</sup> other changes to financial accounting standards, the U.S. Securities and Exchange Commission's (SEC) 2006 regulations requiring detailed disclosures of corporate executive and director pay, etc. Like these measures that preceded it, the instant FASB proposal is intended to foster greater transparency in corporate financial matters. For the reasons detailed in the preceding section of this letter, however, MAPI believes this effort misses its intended mark.

The inherent uncertainty surrounding predictions and assessments about lawsuits makes the additional disclosures being advocated by FASB of little or no use to their intended audience. Indeed, such disclosures are more likely to confuse than enlighten users of financial statements. Moreover, compliance with these new standards would be an extremely time-consuming and costly exercise. In the current overheated environment of accountant and auditor scrutiny, the independent audit process for these enhanced disclosures promises to be an elaborate and expensive spectacle, requiring independent auditors to weigh in on matters outside the scope of their developed expertise. Indeed, the information being examined is so highly subjective and unpredictable that litigation experts, not to mention independent auditors, would probably be unable to corroborate or refute it.

In such circumstances, for the reasons elaborated on in this letter, the dubious/minimal benefits which might result for the proposed additional disclosures are far outweighed by the significant burdens/costs they would bring about. The existing contingent loss disclosures mandated by today's FAS 5, as interpreted and applied by the 1975 American Bar Association/American Institute of Certified Public Accountants (AICPA) Treaty (Statement of Policy Regarding Lawyers' Responses to Auditors' Requests), as well as the information required to be made public in other disclosure vehicles (e.g., AICPA Statement of Position 96-1, SEC Staff Accounting Bulletin 5:Y, Item 103 of SEC Regulation S-K, etc.), at least as they apply to litigation, are far preferable to these proposed changes.

The Alliance appreciates this opportunity to weigh in on these important issues. Thank you for your attention to our comments.

Sincerely,



Thomas J. Duesterberg  
President and Chief  
Executive Officer

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<sup>4</sup> The Public Company Accounting Reform and Investor Protection Act of 2002 (P.L. 107-204, 116 Stat. 745, enacted July 30, 2002).