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Technical Director Via email: director@fasb.org Financial Accounting Standards Board 401 Merritt 7 P.O. Box 5116 Norwalk, CT 06856-5116

Re: File Reference No. 1600-100

Dear Technical Director:

The American Bankers Association (ABA) appreciates the opportunity to comment on the Proposed Statement of Financial Accounting Standards, Disclosure of Certain Loss Contingencies, an amendment of FASB Statements No. 5 and 141(R) (the proposal). Although we understand the Financial Accounting Standards Board's goals, we do not believe the proposal achieves those goals for the reasons stated below. The ABA brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members—the majority of which are banks with less than \$125 million in assets—represent over 95 percent of the industry's \$13.3 trillion in assets and employ more than two million men and women.

We understand the FASB's efforts to attempt to provide improved information for users of financial statements; however, we also believe that such information should be relevant, reliable, and should not be provided to the detriment of shareholders. The proposal does not meet these criteria, as it forces preparers of financial statements (and/or their legal counsel) to predict the outcomes on legal issues for which there may be no basis for prediction, or, alternatively, to present the maximum exposure (or range)—in some instances no matter how remote the probability. This can result in damage to shareholders—the very group that the FASB is attempting to help—due to the reporting of misleading information. We do not support this form of disclosure, and we strongly encourage the FASB to retain current practice rather than issue the proposal as a final standard.

Our primary concerns are as follows:

- 1. Legal issues relating to all entities
- 2. Other legal issues affecting financial institutions
- 3. Class action lawsuits relating to financial institutions

These concerns are described below.



LETTER OF COMMENT NO. 236



# Legal Issues Relating to all Entities

The proposal has legal ramifications in all types of industries. From the financial industry perspective, based on analysis by financial institutions' legal counsel, and our review of the comprehensive comment letters written to the FASB on this topic, we believe the problems with the proposal are insurmountable.

Our members are in agreement with the points raised in the letters submitted by the Association of Corporate Counsel (August 8, 2008 FASB letter of comment #16) and the American Bar Association (August 5, 2008 FASB letter of comment #36). Accordingly, we will not re-address the points raised in those letters. However, the ABA expressly incorporates by reference these letters and the points raised therein in this comment letter. The points raised in the letters submitted by the Association of Corporate Counsel and the American Bar Association are the center of the concerns also held by the ABA.

### Other Legal Issues Affecting Financial Institutions

The proposal would require disclosure of the claim amount or, in the absence of a claim amount, an estimate of the maximum potential exposure to loss. This requirement potentially imposes substantial hardship on financial institutions, which are frequently the subject of claims for action or inaction in handling customer account transactions. Liability and true exposure for claims involving customer account transactions are dependant in large part on the application of legal defenses available to financial institutions for such claims. For example, for claims involving routine check transactions there are numerous defenses, including notice requirements by the consumer to the financial institution, which may substantially reduce monetary amount of claims, even where the plaintiff has specified a total amount involved. This proposed requirement to specify damages quantitatively at the outset of litigation is particularly difficult for financial institutions, for which available legal defenses may abrogate or substantially reduce liability of the financial institution on a plaintiff's claim, but which facts may not be developed for some time through the discovery process. Until discovery is conducted, a financial institution generally is not able to predict the amount by which the claim may be reduced by available defenses.

#### Class Action Lawsuits Relating to Financial Institutions

Also of particular concern to financial institutions are class action lawsuits. Generally, the banking industry is more vulnerable than many other industries to class action lawsuits due to the highly technical and extensive regulatory framework of protections for consumers, the strict compliance standards, provision for statutory damages that are usually applicable regardless of whether any actual harm has occurred, and the statutory provision for recovery of attorney fees which is often the real attraction for class action firms bringing such lawsuits. Additionally, banks are viewed by class action firms and litigants as a "deep pocket" resource for recovery and the type of highly-regulated defendant that often feels compelled by the significant reputational risk of such suits to settle.

In class action suits for violations of these consumer protection laws, the statutory liability as determined by these highly technical provisions may be significant, even where the actual damages ultimately are not, and settlement is often related primarily to attorney fees. Given the vagaries of litigation and the extent of discovery required

to assess adequately many class action claims, banks may be compelled to disclose the maximum exposure, the amount of the plaintiffs' claims, under the proposal. Disclosure of maximum exposure is likely to overstate to shareholders the probable contingent liability.

Given the pressures banks are often under to settle litigation of this sort, the alternative disclosure of a range of likely liability in spite of a questionable likelihood of success may significantly increase costs of settlement including provision for attorney fees by being perceived as "telegraphing" the bank's settlement posture. This would clearly be an aberrant effect unintended by the proposal.

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## Field Test

We support the use of a field test. In order to understand the costs fully, it will be necessary to include a study of the impact on shareholders. If a field test is not done in this manner, then the true benefits and costs will not be tested. That said, a field test of the implementation of the standard and the use of the information would also be useful. Please note that our support of the use of a field test should not be viewed as support for continuing to pursue this project.

## Conclusion

We believe the proposal lacks both relevance and reliability. According to the FASB's Statement of Financial Accounting Concepts No. 2: "Relevance and reliability are the two primary qualities that make accounting information useful for decision making...If either of those qualities is completely missing, the information will not be useful." The proposal does not make improvements over the current standards, and the existing accounting guidance, which should remain in place, provides users with a better quality of representational faithfulness than the proposal.

We appreciate your consideration of these matters, and welcome the opportunity to discuss them with you.

Sincerely,

Donna Fisher

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