

GIBBONS

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## VIA ELECTRONIC MAIL

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

> Re: File Reference No. 1840-100, Proposed Accounting Standards Update, Contingencies (Topic 450), Disclosure of Certain Loss Contingencies

Dear Mr. Golden:

Gibbons P.C., a 230 attorney firm with offices in New York, Newark, Trenton, Philadelphia and Wilmington, welcomes this opportunity to comment on the July 20, 2010 exposure draft referenced above, containing a proposed amendment to FASB 5 (the "Proposed Amendment"). In particular, Gibbons writes to express its concern about the Proposed Amendment's imposition of certain new disclosure requirements related to pending or potential litigation. These proposed requirements would disadvantage corporate litigants and threaten the integrity of both the attorney-client privilege and the attorney work-product privilege. In Gibbons's view, these changes should be rejected in their entirety. While the comments that follow focus on what Gibbons believes are the most egregious flaws in the Proposed Amendment, our position is that the current rule is sufficient and no amendment at all is warranted.

Among the most troublesome provisions of the Proposed Amendments are those that require new disclosures of accrued reserves for "reasonably possible" litigation loss contingencies. Such a requirement both threatens the attorney-client privilege and severely prejudices companies in their dealings with actual or would-be litigation adversaries. The attorney-client privilege is

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threatened because the amount of accrued reserves for future resolution of any particular actual or threatened claim is very often the by-product of a legal analysis performed by counsel concerning the value of the claim. Forced disclosure of the accrual, therefore, is tantamount to forced disclosure of counsel's opinion. From a tactical prospective, the Proposed Amendment is also extremely prejudicial. Once a company has disclosed the amount it has reserved for a claim, it will become very difficult, if not impossible, to negotiate a more favorable settlement of the claim. As to potential, but not yet asserted claims, disclosure of accrued reserves may actually invite litigation that may otherwise never have occurred. One cannot overstate the prejudice created by arming potential and actual adversaries with a window into what a company and its counsel view as the value of pending or potential claims. This is roughly akin to trying to play poker against an opponent who is allowed to see your cards.

The new required disclosure of insurance coverage information, to the extent it has been disclosed to a claimant in discovery, is also highly prejudicial. While such information may well be provided to actual litigation adversaries in discovery protected by a confidentiality order, the broadcasting of the same information to potential future adversaries can be quite harmful. Once again, it invites claims that may otherwise never have been brought by advertising to the plaintiffs' bar that a pot of money stands ready to pay. Uncertainty about the amount of a company's available insurance coverage often operates as a substantial disincentive for plaintiff's counsel (particularly those operating on contingent fees) to bring new cases. If that uncertainty is removed, so too is the disincentive.

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The Proposed Amendment's new requirements for disclosure in a company's financial statement

of the amount of damages claimed by a litigation adversary's expert witness is also prejudicial,

and, indeed, could well have the effect of misleading the reader of the financial statement. In

litigation, a plaintiff's expert's damage calculation is often fanciful and nearly always greatly

exaggerated. Forcing a company to highlight these routinely exaggerated numbers can only

serve to confuse investors with misleading information. This change, therefore, would run

directly counter to FASB's goal of providing meaningful disclosures. In addition, it places the

litigation adversary in the enviable position of being able to unilaterally dictate the contents of

the company's financial statement! Such an ability can very well be used as leverage by such an

adversary to extort a settlement before a bloated expert report is intentionally served to mar the

company's financial statement.

Similar issues infect the other "qualitative" disclosure requirements found in the Proposed

Amendment, all of which unnecessarily invade the company's (and therefore its counsel's)

thought processes. For example, the Proposed Amendment would call upon companies to

disclose the information it deems "relevant" to judging the size of any potential loss. Once

again, sifting through the universe of facts to identify those that are most important is a central

function of litigation counsel. The proposed disclosures, therefore, cannot help but result in the

disclosure of counsel's mental impressions. Moreover, all of these serious problems are

exacerbated by the absence of any exception for prejudicial disclosures. We hasten to add,

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however, that even such an exception would not save what is otherwise a wholly undesirable proposal.

In sum, the Proposed Amendment is not an improvement over the current rule, which adequately serves to protect investors without invading the attorney-client relationship and tactically disadvantaging corporate litigants. We urge rejection of the Proposed Amendment in its entirety.

Sincerely,

Michael R. Griffinger

Director