



September 20, 2010

BY EMAIL TO: director@fasb.org

Russell G. Golden, Technical Director
File Reference No. 1840-100
Financial Accounting Standards Board
401 Merritt 7
P.O. Box 5116
Norwalk, CT 06856-5116

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

Dear Mr. Golden:

We submit this letter on behalf of the Securities Industry and Financial Markets Association (“SIFMA”) in response to the Financial Accounting Standards Board’s (“FASB’s” or “the Board’s”) July 20, 2010 Exposure Draft, Proposed Accounting Standards Update, Contingencies (Topic 450), *Disclosure of Certain Loss Contingencies* (the “Exposure Draft”). SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA’s mission is to promote a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA has offices in both New York and Washington, D.C., and is the U.S. regional member of the Global Financial Markets Association.

In preparing this comment letter, SIFMA received input from members of its Litigation Advisory, Private Client Legal, and Arbitration Committees, among others (collectively, the “Committees”). The Committees consist of senior legal counsel for the following leading investment banks, financial institutions and securities firms, and thus this comment letter reflects discussions both within SIFMA and with a broad cross-section of leading industry members:

Ameriprise Financial	Bank of America
Barclays Wealth	Charles Schwab & Co., Inc.
Citigroup Global Markets Inc.	Credit Suisse
D.A. Davidson & Co.	Deutsche Bank AG
Deutsche Bank Private Wealth Management	DAIWA Securities America Inc.
Edward D. Jones and Co., L.P.	E*Trade Financial Corp.

Fidelity Investments	First Allied Securities, Inc.
FMR LLC Legal Dept.	Goldman Sachs & Co.
ING Americas U.S. Legal Services	Janney Montgomery Scott LLC
JPMorgan Chase & Co.	J.P. Morgan Asset Management
LPL	Merrill Lynch, Pierce, Fenner & Smith Incorporated
Mesirow Financial	MetLife, Inc.
Morgan Lewis & Bockius	Morgan Stanley Smith Barney Legal
Newedge USA, LLC	New York Life Insurance Company
The Northwestern Mutual Life Insurance Company	OppenheimerFunds, Inc.
Piper Jaffray & Co.	Pruco Securities, LLC
Raymond James Financial, Inc.	RBC Capital Markets Corp.
RBS Global Banking and Markets	Robert W. Baird & Co. Incorporated
Royal Bank of Canada	Sanford Bernstein & Co., LLC
Stifel, Nicolaus & Company Inc.	UBS Financial Services, Inc.
UBS Securities LLC	Vanguard Brokerage Services
Wedbush Securities Inc.	Wells Fargo Advisors

Because the members of the Committees are directly involved with litigation matters for their companies and are charged with evaluating litigation contingencies for purposes of making disclosures under FASB Accounting Standards Codification Topic 450 (formerly Statement of Financial Accounting Standards No. 5) (“ASC 450”), our members are well-versed in the issues that are likely to arise if the proposal were adopted in its current form and are directly affected by the proposed changes in disclosure standards. Our members are also among the financial statement users that are the designated beneficiaries of the proposed changes. SIFMA and the members of the Committees are thus well-situated to comment on the proposed changes’ potential impact and efficacy.

SIFMA’s Litigation Advisory Committee commented on the Board’s prior proposal to amend the loss contingency disclosure standards. *See* Exposure Draft, *Disclosure of Certain Loss Contingencies* (an amendment of FASB Statements No. 5 and 141(R)), dated June 5, 2008. The Litigation Advisory Committee, along with numerous other organizations, raised concerns regarding the 2008 proposal, including that it would unfairly prejudice issuers in litigation or regulatory proceedings, or potentially facing claims; would undermine the protections afforded by the attorney-client privilege; and would increase costs and create difficulties for issuers in attempting to apply the proposed standards. While the Board’s proposed reworking of the disclosure requirements applicable to litigation contingencies removes some of the shortcomings that applied to the 2008 proposal, the current Exposure Draft still raises a number of significant concerns.

Of the various proposed amendments to the current standard, SIFMA is focusing its comments on certain of the disclosure provisions regarding litigation-related contingencies. The Exposure Draft proposes that when disclosure about a litigation contingency is warranted, enhanced qualitative and quantitative disclosures about the matter are required. In particular, under the current proposal, companies would be required to provide (1) increasing qualitative disclosures over reporting periods, including whether “the likelihood or magnitude” of a potential loss has increased and “the anticipated timing of, or the next steps in, the resolution of individually material asserted litigation contingencies,” if known (Exposure Draft at 11); (2) additional quantitative disclosures, including non-public information regarding “the possible loss or range of loss and the amount accrued,” if estimable (*id.* at 12); and (3) tabular reconciliations of accrued loss contingencies for each annual and interim period (*id.* at 12-13). The Exposure Draft also (4) expands the categories of loss contingencies that must be disclosed to include “remote” contingencies and unasserted claims under certain circumstances. (*Id.* at 10, 12.)

Our concerns regarding these additional disclosure requirements fall into three categories. First, the current proposal would harm reporting companies by, among other things, impeding their ability to defend themselves in the context of the litigation or regulatory proceeding being disclosed, and impermissibly intruding on the attorney-client privilege and work product doctrine, on which companies rely. Second, as a significant user of financial statements, we believe the disclosures required by the new proposal may require the presentation of potentially misleading information or information based upon subjective opinions and judgments. Third, the increased costs to companies that seek to implement the proposal would far outweigh any conceivable benefit to users of financial statements (who will be required to sift through an array of disclosures, many of which may be speculative, though required), particularly in light of the limited time before the amendments are proposed to become effective.

For each of these reasons, as discussed in detail below, we respectfully submit that adoption of the proposal set forth in the Exposure Draft would be prejudicial in multiple respects to both companies and their shareholders, will not provide users of financial statements with better information, and, therefore, will not advance the Board’s stated interest of improving disclosures. We urge the Board to decline to adopt the proposed changes to ASC 450 contained in the Exposure Draft.

I. THE PROPOSED DISCLOSURES WOULD RESULT IN UNFAIR PREJUDICE TO THE DISCLOSING COMPANY

The current Exposure Draft acknowledges the concern that the 2008 proposal would harm companies by infringing upon the attorney-client and work product privileges. Specifically, the Board states in the Exposure Draft that it decided to “focus” the disclosures on nonprivileged information. Nonetheless, the proposal set forth in the current Exposure Draft is still inconsistent with these privileges in several respects, and would jeopardize greatly a company’s ability to manage its own litigation risks by providing unfair advantages to the company’s litigation adversaries.

Increasing qualitative disclosures over reporting periods. Under ASC 450, companies typically will disclose only publicly-available information about litigation contingencies, such as the nature of the proceedings, the alleged amount of damages (if any), the

progress of the case and any final disposition. These, in essence, are knowable facts that may be disclosed by a company without fear that the disclosures can be used against it by its adversaries. Under the proposal set forth in the Exposure Draft, the disclosure requirements would be expanded significantly. Initially, companies would be required to disclose, at a minimum, the contentions of the parties, including “the basis for the claim” and “the basis for the entity’s defense or a statement that the entity has not yet formulated its defense.” (Exposure Draft at 11.) In future reporting periods, the Exposure Draft contemplates that “disclosure shall be more extensive as additional information about a potential unfavorable outcome becomes available.” (*Id.*) For example, companies would be required to disclose “if the likelihood or magnitude of loss increases.” (*Id.*) For individually material litigation contingencies, a company also would be required to disclose, if known, the anticipated timing of, or next steps in, the matter’s resolution. (*Id.*)

These enhanced disclosures, and particularly the proposed updating process – revealing period-over-period changes in judgmental assessments about the evolution of a litigation matter and the potential outcome – will give adversaries and potential adversaries an unfair window into a company’s views on the litigation matter. A company’s ongoing assessment of the probable losses and anticipated timing of the matter’s resolution necessarily depends upon numerous variables that include, among other things, its evaluation of its own case and its exposure, its views regarding the strengths and weaknesses of witnesses, the progress of discovery, ongoing settlement discussions and analyses, and its view of the approach likely to be taken by the presiding judge. Such information is typically subject to both the attorney-client and work product privileges, and ordinarily would *not* be disclosed to an opponent in the course of litigation.

Disclosing these assessments could undermine the company’s position in the very litigation matters being disclosed, and requiring periodic updates to this information as the company and its counsel consider whether the company’s position has become stronger or weaker over time would benefit primarily the company’s adversaries. We note that the Exposure Draft proposes giving companies the ability to aggregate certain disclosures, and while this is a positive development, it is of limited benefit to companies that are not faced with a significant number of loss contingencies. Moreover, aggregation often would not suffice to insulate from disclosure prejudicial information regarding a company’s assessment of a significant development in an individually material matter.¹

Additional quantitative disclosures. For all contingencies that are at least “reasonably possible,” the Exposure Draft would require companies to disclose both publicly available quantitative information (including “the amount claimed by the plaintiff or the amount of

¹ In addition, the Exposure Draft ignores the effect of the proposed amendments on a company’s ability to respond to a regulatory investigation or proceeding. Providing ongoing assessments of the status of an investigation not only may limit the company’s strategic options in connection with the investigation, but potentially could be self-incriminating or could be used to the detriment of the company’s directors and officers, with even more severe consequences in the context of a criminal investigation. Moreover, providing such assessments regarding regulatory investigations and proceedings may stir up related civil litigation by plaintiffs’ lawyers.

damages indicated by the testimony of expert witnesses”) as well as *non-public information* including “the possible loss or range of loss and the amount accrued,” if estimable, possible recoveries from insurance and other sources, and “[o]ther nonprivileged information that would be relevant to financial statement users to enable them to understand, the potential magnitude of the possible loss.” (Exposure Draft at 12.) These additional quantitative disclosures raise a number of concerns.

First, a company’s disclosure of its estimate of the amount of possible loss as a result of litigation (or for other claims in which a loss is reasonably possible) would arm adversaries with the most sensitive information to utilize against the company during settlement negotiations (as the disclosed estimate might serve as a “floor” for plaintiffs’ demands) or at trial (where a plaintiff might read the company’s estimate of its own potential exposure to the jury). There is no procedural requirement in U.S. litigation or regulatory proceedings that a party must disclose its internal estimate of its possible loss, or to share “other information” that the party believes is relevant to an understanding of the magnitude of its potential exposure. Broadcasting such amounts may lead to self-fulfilling prophecies, all to the detriment of the reporting company’s shareholders.

Second, because such estimates of possible litigation losses necessarily would be based upon the analysis and advice of the company’s counsel, the proposed amendments effectively would result in the disclosure of privileged information. Such a requirement also could put pressure on companies to provide additional privileged information to their outside auditors as part of the auditors’ review of the company disclosures for consistency with the financial statements. Preparing such information and sharing it with the auditors in this context potentially jeopardizes even further the protections otherwise afforded by the attorney-client and work product privileges. *See, e.g., United States v. Textron Inc.*, 577 F.3d 21, 31-32 (1st Cir. 2009) (*en banc*) (tax accrual work papers prepared by company’s lawyers were not protected by the attorney work product doctrine because they “were prepared to support financial filings and gain audit approval”).

Third, the proposal would require companies to disclose “[i]nformation about possible recoveries from insurance and other sources” where such information “is discoverable by either the plaintiff or a regulatory agency.” (Exposure Draft at 12.) This requirement is both vague and extremely broad, as it suggests that disclosure is required whenever the law *would permit* discovery of insurance coverage, whether or not the information has been disclosed during discovery, or even was requested. More concerning is the fact that such a disclosure would telegraph the potential availability of insurance coverage to claimants and potential claimants. Disclosing this information also may be unreliable to the extent it suggests to users of financial statements that coverage is available for a claim, when there is no assurance it will be provided.

Tabular reconciliations over reporting periods. In addition to the specific enhanced qualitative and quantitative disclosure, the Exposure Draft would require companies to provide a tabular reconciliation of accrued loss contingencies in annual and interim financial statements. This tabular reconciliation would include: (1) “[c]arrying amounts of the accruals at the beginning and end of the period”; (2) the “[a]mount accrued during the period for new loss contingencies recognized”; (3) any increases or decreases for changes in estimates for loss

contingencies recognized in prior periods; and (4) any decreases for cash payments or other forms of settlements during the period. (Exposure Draft at 12-13.)

Like the proposed requirement to provide increasing qualitative disclosures over reporting periods, this tabular reconciliation as to every accrual raises the serious potential for loss of privilege and harm to the company. Any changes in the company's disclosures tied to specific claims – particularly disclosures reflecting the company's assessment that the risk or estimate of loss has increased as a result of developments in a litigation – would be exploited by the company's adversaries. Companies should not be required, for example, to disclose their assessment that their adversaries' case has become stronger over time.

Disclosure of remote or unasserted claims. Under the existing standard, disclosure is not required for contingencies that are deemed remote. The Exposure Draft proposes to lower the disclosure threshold by requiring that certain remote loss contingencies also be disclosed. Specifically, the Exposure Draft states that disclosure of asserted, remote loss contingencies may be necessary where the entity is vulnerable to a “potentially severe impact” as a result of the remote contingency. (Exposure Draft at 2, 10.) Similarly, the Exposure Draft would require companies to disclose unasserted claims where “[i]t is considered probable that a claim will be asserted” and “[t]here is a reasonable probability that the outcome will be unfavorable.” (*Id.* at 10.) A company's assessment of these threshold questions necessarily will involve consultation with counsel, and thus, disclosure of such claims inevitably would intrude on the attorney-client and work product privileges. Such disclosures also would invite the assertion of claims where none has been – and may never be – asserted.

No exemption from disclosing prejudicial information. Unlike the 2008 proposal, the current Exposure Draft does not include an exemption from disclosing information that could be prejudicial to an entity's case. As discussed in the prior comment letter, while the proposed standard as drafted in the 2008 proposal was ambiguous, the elimination of any exemption based on prejudice seems intended to preclude companies from undertaking an analysis to determine whether, in their business judgment and in order to protect their shareholders, disclosure of the information would cause more harm than good. SIFMA respectfully urges FASB to make clear that this is not the intended result of any disclosure requirements ultimately adopted.

II. THE PROPOSED DISCLOSURES REGARDING LITIGATION CONTINGENCIES WOULD BE POTENTIALLY UNRELIABLE AND BASED UPON SUBJECTIVE OPINIONS AND JUDGMENTS

A central problem with the Exposure Draft is that it calls for companies to make disclosures that, in the context of litigation matters, may be potentially unreliable and confusing to users of financial statements, as they would be based on opinions and judgments that are inherently subjective and mutable as the litigation progresses. Under ASC 450, companies typically will disclose only material information they know to be *accurate* about litigation contingencies. By contrast, the proposal would require reporting companies to disclose (1) changes in the “likelihood or magnitude” of potential losses; (2) estimates regarding the possible ranges of losses; (3) “remote” loss contingencies; and (4) unasserted claims (which may never be asserted). These proposed amendments likely would require the disclosure of highly speculative information and would abandon a disclosure standard based on accuracy. Further, estimates

regarding the possible outcome of litigation matters are misleading in their appearance of false precision, and very well may have no correlation with the ultimate results.²

In dismissing claims regarding disclosures of litigation contingencies, the courts have endorsed the policy underlying ASC 450 itself that limits disclosures to what can be said *accurately*. As the courts have noted frequently, and are moreover uniquely qualified to assess, potential outcomes and exposures in litigation and regulatory matters often are not capable of being predicted accurately. *See, e.g., In re Alphastar Ins. Group Ltd.*, 383 B.R. 231, 262 (Bankr. S.D.N.Y. 2008) (“The outcome of any litigation is inherently risky. Every trial lawyer has won cases he should have lost, and lost cases he should have won.”); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 200-01 (E.D.N.Y. 2003) (“a legal theory dependent on predicting the outcome of a specific lawsuit is unduly speculative”). For this reason, courts repeatedly have held that companies have no duty to disclose predictions or estimates regarding the outcome of litigation or regulatory proceedings, and that the disclosure of such speculative information before final disposition is actually detrimental to financial statement users. *See, e.g., In re SeaChange Int’l, Inc. Sec. Litig.*, 2004 U.S. Dist. LEXIS 1687, at *26-28 (D. Mass. Feb. 6, 2004) (dismissing plaintiffs’ claims and finding that the company “was not obligated to predict the outcome or estimate the impact” of an ongoing litigation); *In re Citigroup, Inc. Sec. Litig.*, 330 F. Sup. 2d 367, 377 (S.D.N.Y. 2004) (finding that the “federal securities laws do not require a company to accuse itself of wrongdoing”).

Indeed, given the fundamental “vagaries” of litigation, courts have found that such predictions regarding litigation are affirmatively harmful. *See, e.g., Shamrock Holdings, Inc. v. Polaroid Corp.*, 709 F. Supp. 1311, 1320 (D. Del. 1989) (“Out-of-context, hearsay statements from Polaroid directors regarding their views of the judgment would be as potentially misleading as they would be illuminating.”); *In re Western National Corporation Shareholders Litigation*, 2000 Del. Ch. LEXIS 82, at *96 (Del. Ch. May 22, 2000) (finding that “any attempt” by the directors or the company “to disclose through the Proxy Statements the amounts of future settlements or judgments would have been utter speculation and, thus, need not have been disclosed”). If the Exposure Draft were to be adopted, FASB in effect would be substituting its assessment of the predictability of litigation and regulatory contingencies, and the value of such predictions, for that of the many courts and lawyers that have considered the issue and reached exactly the opposite conclusion.

Notably, the proposed disclosure requirements differ from the SEC’s regulations governing a company’s disclosures of legal proceedings in SEC filings. Specifically, Item 303 of Regulation S-K requires that, for all “material pending legal proceedings,” the issuer disclose “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.” (17 CFR 229.103.) Item 103 provides that “[n]o information need be given

² Under the current proposal, entities would not be permitted to “consider the possibility of recoveries from insurance or other indemnification arrangements” when assessing whether a particular loss contingency should be disclosed. (Exposure Draft at 2, 11.) As a result, even if a potential loss is fully insured, it must be disclosed if it meets the disclosure threshold. The exclusion of the impacts of insurance and other indemnification arrangements thus may overstate a company’s potential exposure and potentially mislead users of financial statements.

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.” (*Id.*) The Exposure Draft makes no mention of Regulation S-K or the potential inconsistencies with the current proposal.

Moreover, the public disclosure of damages figures – whether the amount claimed by a plaintiff or estimates derived from the company or from testifying experts – would invest such numbers with false legitimacy that likely would bear no correlation with the actual results in the case. Two cases concerning the same product or event could result in wildly different results in two different states, or even in two different courts in the same state. Further, the plaintiff’s claims may not be indicative of the loss that is ultimately incurred, and the amount of damages estimated by retained experts may vary wildly and reflect bias.³ If the company takes any steps to rebut in its disclosures the alleged damages amounts claimed by plaintiffs or their retained experts, the company would increase its exposure to lawsuits that second-guess, with the benefit of hindsight, the accuracy of such predictions.

III. THE COSTS OF IMPLEMENTING THE PROPOSAL WOULD BE SIGNIFICANT AND WOULD OUTWEIGH ANY CONCEIVABLE BENEFIT

The negative effects on a company’s ability to manage its litigation contingencies discussed above would be accompanied by a correspondingly large increase in the costs associated with making the proposed disclosures. These costs outweigh any conceivable advantage to financial statement users.

Over the more than thirty years in which ASC 450 (or its predecessor, Statement of Financial Accounting Standards No. 5) has been in effect, companies have developed sophisticated protocols for evaluating and disclosing litigation contingencies. As the Board knows, the additional disclosure requirements proposed by the Exposure Draft would require companies to devise and implement a materially different approach to evaluating and disclosing litigation contingencies, at great and continuing expense. The current proposal would require companies to perform costly and time-consuming reviews of information and materials, including non-public materials exchanged in connection with discovery in litigation, in order to provide the required qualitative disclosures, estimates and period-over-period assessments. In

³ Indeed, because of concerns that a plaintiff’s demand for a specific amount may improperly influence the jury’s decision or may cause harm to the defendant, federal courts and commentators have expressed doubt as to whether federal courts even should permit a party to plead a specific amount of monetary damages. *See, e.g., Mitchell v. American Tobacco Co.*, 28 F.R.D. 315, 319-20 (M.D. Pa. 1961) (striking damage demand due to the “chance of irreparable damage to the defendants [from] the possible wide dissemination” of the amount alleged); Charles Alan Wright and Arthur R. Miller, *5 Federal Practice & Procedure Civ.* § 1259 (3d ed.) (noting commentators’ views that the inclusion of a specific damages demand should be barred in jury cases “on the theory that its disclosure, either by direct presentation in court or through outside publicity given to the pleading, might unnecessarily influence the jury’s final determination of both the issue of liability and damages”). Requiring public disclosure of not only the plaintiff’s claimed amount of damages but also the damages estimates of retained experts and the company would only increase these concerns.

addition, the costs to financial statement users similarly would increase under the proposal as users of financial statements will be forced to sort through even more disclosures, including disclosures related to remote contingencies and speculative estimates.

SIFMA submits that – particularly because the concerns addressed above outweigh the benefits of the increased disclosure requirements – the expense is not warranted. At a minimum, given that the amount of additional information and nature of the assessments that would be required to be reported – all of which is vastly different than what is currently required – the proposed effective date (fiscal years ending after December 15, 2010) would not allow companies sufficient time to adjust their policies and practices. This is particularly true for companies with significant numbers of litigation contingencies.

IV. CONCLUSION

For these reasons, we urge FASB to decide against adopting the proposed changes to the disclosure rules regarding litigation contingencies that are contained in the Exposure Draft. The Exposure Draft seeks to modify existing disclosure standards in a way that is fundamentally incompatible with the goal of fairly presenting accurate information to users of financial statements. It would cause undue expense and harm to companies.

We thank the Board for the opportunity to comment on the Exposure Draft, and as we have informed the Board previously, we would like the opportunity to participate in any roundtable(s) held regarding the proposal, as well as any further process regarding this issue

Very truly yours,



Kevin M. Carroll
Managing Director and
Associate General Counsel

cc: Mr. Robert H. Herz, Chairman, Financial Accounting Standards Board
Dr. Thomas J. Linsmeier, Financial Accounting Standards Board
Ms. Leslie F. Seidman, Financial Accounting Standards Board
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