



September 20, 2010

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

Re: File Reference No. 1840-100---
Disclosure of Certain Loss Contingencies

Dear Mr. Golden:

The Society of Corporate Secretaries & Governance Professionals (the "Society") appreciates the opportunity to respond to the Exposure Draft ("ED") on Contingencies (Topic 450) issued by the Financial Accounting Standards Board ("FASB") on July 20, 2010.

The Society is a professional association, founded in 1946, with over 3,100 members who serve more than 2,000 companies. Our members are responsible for supporting the work of corporate boards of directors and their committees and the executive management of their companies regarding corporate governance and disclosure. Our members are generally responsible for their companies' compliance with the securities laws and regulations, corporate law, and stock exchange listing requirements. The majority of Society members are attorneys, although our members also include accountants and other non-attorney governance professionals.

Society members share with the FASB and with investors the concern for transparent, clear and correct financial statements. We therefore appreciate the revisions reflected in the ED, which improve in several ways the proposals set forth in the June 2008 initial draft ("Initial Draft").

Our comments on the ED are predicated on the following: Financial statements should include transparent, correct and timely information, but not information

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that is speculative, prejudicial to the company and detrimental to its shareholders. Disclosure requirements should balance the needs of investors in receiving timely and meaningful information while, at the same time, protecting from disclosure privileged or confidential information, or information that is speculative or not meaningful. As we discuss in further detail below, we believe that, in fundamental ways, the ED does not strike the appropriate balance between those objectives.

I. Specific Comments on the ED

A. Quantitative Disclosures Required by the ED. In several respects, the required quantitative disclosures of "reasonably possible" loss contingencies do not appropriately balance the investor's need for information against the prejudicial impact to the company of disclosing that information.

First, disclosure of actual accruals for litigation reserves could result in judicial findings of waiver of the attorney-client privilege and work-product protection. The amount of an accrual is usually determined in consultation with, and upon advice of counsel and, thus, accrual amounts are generally protected from disclosure by such privilege. However, under the ED, each accrual amount, together with sufficient information to enable the auditors to evaluate the legal analysis underlying such disclosure, will likely need to be disclosed to the company's auditor as part of the audit process—increasing the likelihood that a court will find that the company, in so disclosing such information, has waived its attorney-client and work-product privileges.

Waiver of such privileges would open the door to discovery of the accrued amounts by plaintiffs and juries. Disclosure to juries, who may be unfamiliar with the nuances of technical accounting requirements, could lead them to the erroneous conclusion that the accrued amount is an admission of "guilt", and unduly prejudice their evaluation of the merits of the case. Disclosure to the plaintiff of an accrued amount—which is, by definition under the accounting literature, an amount that the company and its counsel have deemed "probable" and "reasonably estimable"—is tantamount to giving the plaintiff the amount the company is willing to pay to settle the case, or the amount it believes it is

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likely it will be adjudicated to pay. Thus, disclosure of the accrued amount will make it very unlikely the company will be able to settle for an amount that is less than the accrued amount, with the result that such disclosure is likely to set a "floor" for plaintiff's demands and increase the cost of the resolution of lawsuits to the company and its shareholders.

The tabular reconciliation required by the ED exacerbates the potential prejudicial effect of the disclosure on companies. Although the ED provides that the tabular reconciliation may be made "by class", the permissible aggregation standards appear to be narrow and, therefore, the permitted aggregation will not be sufficient to shield prejudicial information by combining it with other information. In any case, where a company is involved in a single, large legal dispute, aggregation may not be possible—and even if there are several cases that can be aggregated, if one is more significant than the others, any changes in accrual amounts would be highly visible. Thus, to the extent an adjustment in a quarterly accrual can be traced to a particular matter, plaintiffs will be able to obtain quarterly information on the company's evolving view of the litigation, thereby increasing their leverage in settlement negotiations.

We therefore believe the quantitative disclosures of loss contingency accruals, as proposed in the ED, will compound the likelihood and severity of the contingent loss and result in higher settlements.

In contrast, it is not apparent that disclosure of accrual amounts will assist investors in better understanding the effect a company's litigation may have on its financial condition. All amounts that already are accrued are included in the company's financial statements and are therefore reflected in the company's results of operations. In addition, ASC 450 currently requires disclosure of accrued amounts that are material where it "may be necessary for the financial statements not to be misleading".

We believe implementation of the ED will produce an undesirable policy outcome—rather than providing additional, meaningful information to investors, it will provide prejudicial information to an adversary in litigation

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who can use that information to its advantage at the expense of the company and its shareholders.

B. Qualitative Disclosures. We also question the need for certain of the qualitative disclosures required by the ED. As discussed below, we do not believe the required information would be meaningful to investors; rather disclosure of such information could, at best, be confusing to investors, and, at worst, be misleading to investors and prejudicial to the company.

1. Amount of Damages Asserted by Plaintiff's Expert Witness. We do not believe disclosure of "the amount of damages indicated by the testimony of expert witnesses" is likely to be useful to investors or users of a company's financial information. Typically plaintiff's experts endorse the damages claims made by the plaintiff—no matter how speculative the claimed amounts appear to be. Thus, disclosing the amount of damages asserted by plaintiffs' experts would add no new, meaningful information to investors; instead, it could mislead investors about the potential magnitude of the loss contingency by making it appear more substantial than it is.

While we note the ED does permit disclosure by companies of their view of damage amounts, in the early stages of the litigation it may not be possible for a company to assess with reasonable certainty what the damages may be and, at later stages of the litigation, as noted above, companies will be reluctant to make such disclosure as this would be tantamount to providing a "settlement floor" to plaintiffs. Accordingly, the effect of the ED is likely to cause companies to disclose only the damage amounts asserted by plaintiff's expert witness—which would result in a one-sided view of damages.

The intent of financial reporting is to provide reliable and relevant information for financial statement users. In its Statement of Financial Accounting Concepts No. 2 (Qualitative Characteristics of Accounting Information), FASB stated that relevant accounting information "is capable of making a difference in a decision by helping users to form predictions about the outcomes of past, present and future events or to confirm or correct prior expectations." But because a plaintiff's expert witness is obviously biased, and companies are unlikely to disclose their own assessments of the damages, the disclosure of

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expert witness testimony as to damages is not likely to help investors form predictions about the outcome of the litigation.

2. Insurance Recoveries. We believe the ED's required disclosure of "possible recoveries for insurance" if the information is "discoverable by either the plaintiff or a regulatory agency" undermines and reverses the protection currently afforded companies regarding their insurance coverage.

As information about possible insurance recoveries is generally discoverable, the plaintiff in the subject lawsuit is not disadvantaged by the lack of public disclosure of such information. However, when such information is disclosed to the plaintiff, it is generally done under a protective order that requires the plaintiff to keep the applicable policy terms confidential; this is done to ensure that such information is not used to the company's detriment in other actions. In contrast, under the ED, this policy would be completely undermined because a disclosable legal contingency would now require public disclosure of a company's insurance coverage for that type of claim. The effect of the ED on a company would inevitably be to attract previously unasserted claims by other litigants seeking the additional, now-known, resources of the insurance coverage.

3. Disclosures regarding "Remote" Loss Contingencies. We do not believe disclosure of "remote" contingencies that may give rise to a "potential severe impact" on the company would provide meaningful disclosure to investors. The intended purpose of the ED's disclosure requirement is to increase the number and types of contingencies requiring disclosure. However, in practice, the ED is likely to give rise to disclosures of speculative or frivolous lawsuits and, as a result, the disclosure requirement will, in effect, provide meaningless disclosure to investors. The current ASC 450-20 approach allows companies to classify frivolous or speculative lawsuits as "remote" until a court ruling determines otherwise; in contrast, the ED would give legitimacy and credibility to these types of lawsuits upon their filing.

Further, the ED's stated disclosure standards for determining whether a remote contingency will create a potential severe impact on the company are based on judgments and are subject to management conjecture and speculation: What

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will the action cost? How much time and resources will management need to devote to it in the future?

Finally, increasing the number of litigation matters that are described in a company's financial statements—particularly when the increased number is due to discussions of remote, possibly frivolous lawsuits—gives rise to less meaningful disclosure overall as it dilutes the effectiveness to investors of the disclosures concerning the more substantive litigation matters that are required under the current standard.

Rather than enhancing a company's disclosures, discussion of "remote" loss contingencies will clog the disclosure with more extensive, but less meaningful, information.

4. Other Qualitative Information about Aggregated Qualitative Information. While, as noted above, the ED would allow disclosures to be presented on an aggregated basis under certain circumstances, if aggregated disclosures are so provided, the company must also disclose: (i) the average amount claimed and (ii) the average settlement amount. None of these "averages" would provide any meaningful information to financial statement users about the potential magnitude of the litigation because, among other things, they could be skewed by inflated claims or unique settlements. The amount of a plaintiff's demand does not generally represent the actual amount paid when the claim is resolved. The amount asserted is being advanced by an advocate and the magnitude of the amount claimed can be driven by many factors, including the plaintiff's desire for publicity. Similarly, requiring disclosure of the "average" settlement amount would erroneously suggest to financial statement users that this information is predictive of the outcome of the remaining litigation. To the contrary, that average could be significantly higher or lower depending on the specific facts at issue in the remaining cases.

In summary, the quantitative and qualitative disclosures required in the ED could result in the disclosure of inaccurate, misleading and confusing information. Such disclosures could also potentially create additional litigation for companies, and could prejudice settlement discussions between the

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company and the plaintiff to the detriment of the company's shareholders. Thus, these additional disclosures could prove harmful to a company and its shareholders in a way that is not balanced by perceived benefits of the disclosures to investors.

C. Scientific Studies. We note that FASB has added a new factor to consider with respect to determining whether an unasserted claim is probable of being asserted—that is, whether a company is aware of the existence of studies in scientific journals that indicate potential hazards may exist related to the company's products or services. This factor was not contained in the Initial Draft, and it is unclear why it is now included in the ED.

Reputable scientific studies are often debated among experts for years after publication, and/or are often later discredited. It is therefore impractical to require companies to assess each study that is published to determine whether it is "credible" for purposes of applying the proposed guidance.

Even if such an assessment were possible, the mere existence of a scientific study indicating a "potential" significant hazard would not, in and of itself, constitute a basis for a claim; nor may it have implications for a company's potential liability which ultimately will depend on a multitude of factors. Publication of a study should be considered in the same way as a "remote" loss contingency—which is to say, it need not be disclosed until some other action makes it less than remote.

We therefore believe addition of this factor will complicate, rather than enhance, the application of the existing standard for the disclosure of unasserted claims and assessments.

Even worse, it will create more litigation by giving plaintiffs another reason to sue, whether or not a study is credible or reputable. In any case, such a factor should not be introduced without an explanation of its benefits, particularly in light of its ambiguity and potential for creating costs for companies.

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II. General Concern

We note a separate concern that disclosure in the financial footnotes is not subject to the protection of the statutory safe harbor of the Private Securities Litigation Reform Act of 1995 (“PSLRA”). Congress enacted the PSLRA to promote disclosure by companies and to encourage them to make forward-looking statements about the company’s prospects (i.e., discuss trends known to management that would materially impact a company’s results) without the fear that they and their managers would be subject to frivolous strike-suits if these predictive statements turned out to be incorrect.

To promote these objectives, forward-looking statements are encouraged in “management’s discussion and analysis (MD&A),” and those sections of a company’s filings with the Securities and Exchange Commission (“SEC”) are afforded the protection of the safe harbor. In contrast, the historical information contained in the financial information and footnotes are not afforded the protection of PSLRA. The ED, by requiring that subjective and predictive, forward-looking information be included in the footnotes, where the benefit of the safe harbor is not available, could create potential liability for companies and their managers if such predictive information is later found to be in error.

As discussed above, much of the information required by the ED—both qualitative and quantitative information—about litigation against a company cannot be calculated without significant management judgment. If FASB adopts the proposed disclosure regime, we would strongly urge FASB to provide, as part of ASC 450 requirements, that such disclosure be included in the Notes to Financial Statements “only to the extent that the same disclosure is not otherwise contained in a document accompanying the financial statements.” This would provide companies and the users of their financial statements with two benefits: first, it would eliminate redundancies in a company’s disclosures; and, second, it would provide more safeguards to companies and their managers with respect to such disclosures.

In addition, although disclosure relating to a company’s litigation is an important component of financial statements, the substantial majority of the

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information required by the ED duplicates most of the requirements under Item 103 of Regulation S-K. A review of sample disclosures by public companies reveals that the disclosures made pursuant to Item 103 and the contingency footnote are often redundant. Not only is this unnecessary, but it frustrates the principle of Plain English so necessary to users of financial statements.

Finally, by requiring such disclosures in the financial statements, an undue burden is placed on auditors who are being required to audit an area that is, by its very nature, imprecise, outside their expertise, and complicated by the attorney-client privilege. Although we appreciate that FASB took steps to eliminate many of the more speculative or predictive disclosures that were contained in the Initial Draft, the ED nevertheless still requires audit work to be performed on forward-looking information and on matters that require substantial management judgment—such as, the “likelihood or magnitude of loss increases,” the “anticipated timing” of next steps in the resolution process, or the company’s “vulnerability to a potential severe impact.”

Given the inherent imprecision and lack of predictability of pending litigation, it would be far better to provide that the disclosure of the matters required by ASC 450-20 be included in a company’s MD&A (where such disclosures would be subject to the safe harbor for forward-looking statements contained in the PSLRA)—rather than in the Notes themselves. This would provide the necessary information to investors without causing harm to companies and their shareholders.

III. Summary

In summary, the ED risks creating significant prejudicial and negative financial effects on companies, without providing any real measure of additional meaningful disclosures to investors. We appreciate that the intended goal of the ED was to avoid litigation “surprises” for investors by providing them with more preliminary and granular information.

However, given the nature and dynamics of litigation in the United States, the information required to be disclosed by the ED would give plaintiffs a “litigation roadmap.” The information sought has the potential to jeopardize

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the ability of companies to preserve the privilege of confidential information to the detriment of their shareholders. While "surprises" can never be totally prevented, if FASB is concerned about certain disclosure practices of U.S. companies, we would support FASB issuing guidance requiring companies to focus on, and comply with, the current disclosure requirements of ASC 450-20. We would also urge FASB to require that such disclosures be provided in the Notes, only if the same disclosure is not otherwise contained in the MD&A.

IV. Responses to ED Questions.

Our responses are as follows:

Question 1. Are the proposed disclosures operational? If not, please explain why

As discussed above, we do not believe the tabular reconciliation or the disclosure of remote contingencies is operational. In the latter case, such disclosures would require companies to make speculative judgments without a sufficient basis in facts and information. As to the former, in addition to the disclosure of such information being prejudicial, it is not clear operationally whether the controls and procedures to audit such a reconciliation can be completed in time for an effective date of December 15, 2010. As discussed in the answer to Question 4 below, the requirements of the ED will necessitate a resource-intensive evaluation, involving in-house counsel, outside counsel, finance professionals, management and auditors. For multi-national companies with multiple types or large quantities of litigation, the act of classifying (and, perhaps, aggregating) their litigation, the establishment of the audit procedures, and understanding the AICPA/ABA "treaty" implications of the ED, are but a few of the issues that will need to be resolved.

Question 2. Are the proposed disclosures auditable? If not, please explain why.

As noted above, under "General Concern", it is not clear at the present time whether the requirements of the ED are auditable, both because of the predictive nature of some of the requirements, as well as the implications of an

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audit on the attorney-client privilege and work-product protection. We believe the requirements of the ED would need to be discussed with the PCAOB, the AICPA, and the ABA to understand how an auditor could perform an audit of these disclosure requirements.

Question 3. The June 2008 FASB Exposure Draft, Disclosure of Certain Loss Contingencies, had proposed certain disclosures based on management's predictions about a contingency's resolution. The amendments in this proposed Update would eliminate those disclosure requirements such as estimating when a loss contingency would be resolved and the entity's maximum exposure to loss. Do you agree that an explicit exemption from disclosing information that is "prejudicial" to the reporting entity is not necessary because the amendments in this proposed Update would:

- a. Not require any new disclosures based on management's predictions about a contingency's resolution***
 - b. Generally focus on information that is publicly available***
 - c. Relate to amounts already accrued in the financial statements***
 - d. Permit information to be presented on an aggregated basis with other similar loss contingencies?***
- If not, please explain why.***

We believe an explicit exemption is necessary. Though the proposal has been revised to eliminate disclosure of settlement offers and some predictive elements, other predictive disclosures that do not rely exclusively on public information remain—and if disclosure of accrual amounts and the tabular reconciliation remain in the ED, it will likely be prejudicial and detrimental to the company. As such, for legal contingencies, there should remain a "prejudicial exemption." Litigation is, in the United States, an inherently adversarial process. While transparent disclosure is an appropriate objective for companies, disclosure should not become an opportunity for abuse by certain plaintiffs' lawyers who will seek to use such disclosures to their advantage in litigation or in settlement talks, which actions are not intended to benefit the company's shareholders as a whole, or users of financial statements. As such,

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an explicit exemption for the disclosure of prejudicial information would be fair and appropriate.

Question 4. Is the proposed effective date operational? If not, please explain why.

As noted above, we believe the proposed effective date is too early, as there are not only uncertainties regarding how the disclosure requirements will be audited and how the audit processes and procedures will align with the AICPA/ABA "treaty," but there are also significant operational issues for companies to consider. It will take time to implementing appropriate disclosure controls and procedures around the process of collecting, reviewing and disclosing the data, including reviewing the entire litigation portfolio to determine appropriate levels of aggregation (particularly in light of the tabular information required to be provided). Preparing this disclosure will involve discussions among a company's in-house legal staff, each of the respective outside counsel representing the company in each of its litigation matters, in-house accounting and finance personnel, relevant business management and the outside auditor. The changes proposed by the ED are extensive and will require time for meaningful assessment and implementation by all relevant parties.

Question 5. Do you believe that the proposed disclosures will enhance and improve the information provided to financial statement users about the nature, potential magnitude, and potential timing (if known) of loss contingencies?

No. We believe much of the factual information required to be disclosed by the ED is redundant and already disclosed elsewhere in SEC filings. We further believe the primary beneficiaries of the new quantitative and qualitative disclosure requirements discussed above will be plaintiffs' attorneys, not investors. Accordingly, we do not believe the ED will provide additional meaningful disclosure to users of financial statements.

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Questions 6-8: We express no view about nonpublic entities or XBRL.

* * * *

We appreciate the opportunity to comment on your proposal.

Sincerely,

A handwritten signature in blue ink that reads "Darla C. Stuckey". The signature is written in a cursive style with a large, looping 'D' and 'S'.

Darla C. Stuckey
Senior Vice President – Policy & Advocacy