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FASB Proposes Significant Expansion of Disclosure Requirements for Loss Contingencies

New York
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The FASB recently published for comment proposed amendments to the accounting standards for disclosure of loss contingencies.[1] The proposed amendments respond to concerns raised by users of financial statements that the current disclosure requirements under SFAS 5, *Accounting for Contingencies*, do not provide sufficient information in a timely manner to assist them in assessing the likelihood, timing and amount of future cash flows associated with loss contingencies. If adopted as proposed, the amendments would require companies to disclose a broader range of contingencies than currently required, and would significantly expand the nature and scope of quantitative and qualitative disclosure required for disclosed contingencies.

First, disclosures would be required for a larger universe of loss contingencies, including those as to which the company is unable to determine that the likelihood of a loss is "remote" (as opposed to the current standard of requiring inclusion only where the likelihood of loss is "at least reasonably possible"). In addition, disclosure would be required for any loss contingency that could have a "severe impact" on the company and is expected to be resolved within a year, no matter how remote the likelihood of loss and whether or not any claim has been asserted or is likely to be asserted.

Second, and even more importantly, required disclosure would be expanded to include additional quantitative information regarding the amount of the loss contingency, the company's assessment of the timing and expected resolution of pending litigation, the factual and legal background of the contingency, the factors likely to affect the outcome, and assumptions relied upon by the company in assessing the likely outcome and amount of a disclosed contingency.

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1 Financial Accounting Standards Board, Exposure Draft, Proposed Statement of Financial Accounting Standards, *Disclosure of Certain Loss Contingencies*, *an Amendment of FASB Statements No. 5 and 141(R)*, Release No. 1600-100 (June 5, 2008), available at http://www.fasb.org/draft/ed_contingencies.pdf.

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These disclosure requirements, including the additional quantitative information, would apply whether or not a company had provided an accrual for the loss contingency in question. For those loss contingencies where a company has provided for accruals, it also would be required to include a tabular reconciliation in the footnotes to its financial statements to specify changes to those accruals.

Taken together, the proposed amendments would greatly expand the information available about a company's loss contingencies. Whether the predictions and judgments they require can be made with sufficient accuracy and reliability to be probative in fact is unclear. What is clear, however, is that providing the additional information would come at great cost: the very information the FASB believes would be useful to investors undoubtedly will be far more useful to the company's adversaries in the litigation process. Expanded disclosure of a company's expectations regarding the timing, likelihood and amount of potential charges relating to contingencies also could expose the company to further litigation risk if the amount or timing of actual charges proves to be materially different than expected. Moreover, these forward-looking statements would not be protected by the safe harbor provided by Congress for forward-looking statements.[2]

Comments on the proposed standard are due August 8, 2008. Given the potential harm the proposed rules would pose to a company's litigation posture, we expect many commenters will ask the FASB to significantly scale back the required disclosure.

Background

Under current accounting standards as set forth in SFAS 5, *Accounting for Contingencies*[3], and related FASB interpretations:

- A company must accrue an estimated loss from a loss contingency if both: (a) information available prior to issuance of the financial statements indicates that it is probable that a liability has been incurred at the date of the financial statements, and (b) the amount of loss can be reasonably estimated. If the reasonable estimate of a probable loss is a range, the best estimate within that range must be accrued, unless

[2] 15 U.S.C. §78u-5(b)(2)(A) ("Except to the extent otherwise specifically provided by rule, regulation, or order of the Commission, this section shall not apply to a forward-looking statement … that is … included in a financial statement prepared in accordance with generally accepted accounting principles").

[3] FASB Statement No. 5, *Accounting for Contingencies* (March 1975), *available at* http://www.fasb.org/pdf/fas5.pdf.

no amount within the range is a better estimate than any other amount, in which case the minimum amount in the range must be accrued.[4]

- Even if no accrual is made (or where the possibility exists that the final amount will exceed the amount accrued), a company must disclose the contingency in the footnotes to its financial statements if there is at least a "reasonable possibility" (defined as more than a remote likelihood) that a loss or an additional loss may have been incurred. The disclosure must describe the nature of the contingency and either give an estimate of the loss or range of loss or state that such an estimate cannot be made.

The outcome of litigation is often difficult to predict, particularly during the early stages of a proceeding, when the facts that will come to light during the discovery process are uncertain. In the early stages, a company may lack sufficient information to reach any conclusions about the likelihood of loss, and may conclude that no disclosure is required under SFAS 5 because it lacks a basis to conclude that a loss is reasonably possible. As more facts are discovered during the litigation process, a company may determine that disclosure of the nature of the litigation is required under SFAS 5 because the likelihood of loss is reasonably possible (*i.e.,* more than remote), but it still may lack sufficient information to make a reasonable estimate of the loss or range of loss. As a result, while the possibility of loss and nature of a proceeding often are made public not long after a case is brought, disclosure of the amount or range of loss is sometimes not made prior to settlement or resolution of the proceeding.

Determining when the amount or range of loss associated with a loss contingency can be reasonably estimated, and the amount of that range, requires judgment. Some critics have complained that the judgmental nature of the standard makes it susceptible to abuse, and that companies too often delay disclosure of the amount of potential charges beyond the point when a range of loss could have been reasonably estimated, in order to take the charge to earnings when it is most convenient.[5]

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[4] FASB Interpretation No. 14, *Reasonable Estimation of the Amount of a Loss* (Sept. 1976)("FIN 14"), *available at* http://www.fasb.org/pdf/fin%2014.pdf.

[5] See, e.g., Reed Abelson, *Messy Accounting*¸ Forbes (Oct. 14, 1991) ("Accounting guidelines say that as soon as a company considers a liability is "probable" and can reasonably be estimated, it must start accruing charges -- that is, deducting amounts from today's earnings to cover the future expense. But 'reasonably estimated' is … vague … Some companies seem to take advantage of this by taking the hits to earnings when it's most convenient"). Under FIN 14, once it is possible to reasonably estimate a range of loss, a charge of at least the minimum amount must be accrued if the loss is probable; delaying a decision that a range of loss can be reasonably estimated thus may also delay the timing of an accrual for a probable loss.

In its description of the basis for the proposed standard, the FASB cites a number of concerns raised by financial statement users. The FASB notes criticisms that the initial disclosure of specific information about a loss contingency often does not occur until a material accrual is recognized,[6] and the option to state that a reasonable estimate cannot be made is exercised with such frequency that users often have no basis for assessing an entity's future cash flows associated with loss contingencies. Another user complaint cited by the FASB is that the "reasonably possible" threshold has not resulted in disclosure of the full population of loss contingencies that would be of interest to financial statement users. Finally, with respect to presentation of amounts accrued, the FASB notes criticisms that the amounts recognized in the financial statements for loss contingencies and the changes in those amounts over time are not transparent to users. To address these concerns, the FASB proposes to significantly expand its disclosure requirements for loss contingencies, as described below.

The Proposed Amendments

When Disclosure Would be Required. Under the proposed standard, disclosure of a contingency generally would be required unless (a) the company has made a determination that the likelihood of a loss is remote, or (b) the contingency involves an unasserted claim or assessment where there has been no manifestation of awareness by a potential claimant, unless it is probable that a claim will be asserted and the likelihood of a loss is more than remote.

In theory, the "more than remote" formulation of the probability trigger might be viewed as substantively identical to the current standard, because SFAS 5 defines "reasonable possibility" to mean "more than remote but less than likely." In practice, the explicit placing of the burden to determine remoteness on the company and experience under the PCAOB's internal control auditing standards and related SEC rules, which were recently amended to replace a "more than remote" threshold with a "reasonable possibility" threshold, suggests that issuers and auditors would perceive the new "remote" standard to be lower – i.e., more frequently tripped.[7]

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6 SEC Deputy Chief Accountant Scott Taub made similar criticisms in a series of speeches in 2004. See, e.g., *Remarks before the 2004 AICPA National Conference on Current SEC and PCAOB Developments* (Dec. 6, 2004), *available at* http://www.sec.gov/news/speech/spch120604sat.htm ("[T]he recording of a material accrual for a contingent liability related to an event that occurred several years before should not be the first disclosure regarding that contingency. Rather, disclosures regarding the nature of the contingency and the amounts at stake should, in most cases, have already been provided").

7 See PCAOB Release No. 2007-005A, Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting that is Integrated with an Audit of Financial Statements* (June 12, 2007)("some auditors and issuers have misunderstood the term 'more than remote' to mean something significantly less likely than a reasonable possibility. This, in turn, could have caused these issuers and auditors to evaluate the likelihood of a misstatement at a much lower threshold than the Board intended").

A far more significant change, however, would be the new exception to the general rule: disclosure of a contingency would be required when the contingency is expected to be resolved within the next year, and could have a "severe impact" on the company's financial position, cash flows or results of operations, regardless of the likelihood of loss, regardless of whether the claim has been asserted, and regardless of the likelihood of assertion. A "severe impact" is defined as a higher threshold than material but less than catastrophic, and means a "significant financially disruptive effect on the normal functioning of an entity."

This new exception would represent a noteworthy departure from existing practice. Today, SFAS 5 does not require disclosure of remote contingencies. Under the proposed standard, a company would be required to disclose detailed information about any contingency that could have a "severe impact" within the next year, even if the probability of an adverse outcome is remote, and therefore highly unlikely. This would require companies to provide significant disclosure about frivolous cases the company expects to win, and that, because they are remote, may be of little interest to a reasonable investor. While the standard includes a general provision to the effect that it need not be applied to "immaterial items," the lack of detailed discussion of the provision in the FASB's exposure draft suggests it may be difficult in practice for companies to rely on that general provision to avoid disclosure. The FASB's approach here appears to be that at some level of impact, disclosure is required no matter how remote the likelihood. This would represent a radical departure from the generally accepted methodology for assessing materiality, which takes into account both the likelihood of an event and the impact of the event.[8]

For unasserted claims, the disclosures the new exception would require appear to be not merely unnecessary but also highly prejudicial to a company. Under the proposed standard, if a company believes an unasserted claim could, if asserted and resolved against the company, have a "severe impact" and be resolved within the next year, disclosure would be required even if the potential claimant has evidenced no awareness of the potential claim and even if the likelihood of an adverse outcome is remote. Such disclosure could expose a company to a heightened risk of frivolous litigation by highlighting unasserted claims that may have a low probability of success, but nonetheless might well have some settlement value (even nuisance settlement value). Similarly, where one of the company's reasons for concluding resolution within the next year is likely is that the statute of limitations for an unasserted claim will run within that year, requiring disclosure of the contingency and the company's analysis could jeopardize the potential statute of limitations defense by

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[8] See e.g., Basic, Inc. v. Levinson, 485 U.S. 238 (1988)("with respect to contingent or speculative information or events . . . materiality 'will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event . . .'"), citing SEC v. Texas Gulf Sulphur Co., 401 F.2d 849 (2d Cir. 1968) (en banc), cert. denied , 394 U.S. 976 (1969).

reminding potential claimants of the need to bring suit to preserve their rights. While the exception to disclosure of prejudicial items described below may provide some relief, it is unlikely to be sufficient to resolve the issue, because it would still require mandatory disclosure of facts that are likely to be prejudicial.

The FASB's approach would also require disclosures about a broader population of contingencies than required by the comparable current standard under International Financial Reporting Standards, or IFRS. IAS 37, *Provisions, Contingent Liabilities and Contingent Assets,* does not require disclosures for remote loss contingencies regardless of the expected timing of resolution or potential severity of the contingency. The FASB acknowledges the lack of convergence, but notes that the IASB is still deliberating changes to the disclosure requirements under IAS 37 and therefore would have the ability to consider the proposed standard when it reconsiders the IAS 37 disclosure requirements. How this represents genuine convergence is unclear, as is the suggestion that if IAS 37 is not adjusted to converge with the FASB proposal, the FASB can always reconsider its approach in its longer-term project on loss contingencies.

Finally, the proposed amendments likely would further strain the relationship between the issuer and its auditors, which may be expected to request documentation to support a company's disclosures under the standard.[9] To the extent the principal support for such disclosures lies in privileged advice from counsel, a company may be unable to furnish that advice to its auditors without risking the waiver of privilege.

Mandatory Quantitative Disclosure. When disclosure of a contingency is required, the standard would require a company to make the following disclosures (which may be aggregated by the nature of the loss contingency (for example, product liability or antitrust matters)). Disclosure would be required even if the amounts have already been recognized in the financial statements.

- If the amount of the claim or assessment (including damages, such as treble or punitive damages) is known, that amount must be disclosed.[10]

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[9] The PCAOB has criticized auditors for failure to review letters of counsel in connection with audits involving loss contingencies. See e.g., PCAOB, Report on 2003 Limited Inspection of Deloitte & Touche LLP (Aug. 26, 2004) at 19-20; PCAOB, Report on 2003 Limited Inspection of KPMG LLP (Aug. 26, 2004) at 19, n.4. Efforts to audit the increased disclosures could also place further strains on the "Treaty" between the American Bar Association and the AICPA that governs lawyers' responses to auditors' inquiries. See ABA Statement of Policy Regarding Lawyers' Responses to Auditors' Request for Information (1975); Statement on Auditing Standards No. 12 (1976).

[10] The FASB notes in the Exposure Draft that financial statement users suggested that the FASB should require disclosure of settlement offers made between counterparties in a dispute. The FASB decided not to require that

- o If there is no claim or assessment amount, the company must provide its best estimate of the maximum exposure to loss.

- o If the company believes the amount of the claim or assessment or the maximum exposure to loss is not representative of the company's actual exposure, the company may, but is not required to, disclose its best estimate of the possible loss or range of loss.

The proposed standard represents a significant change in the FASB's approach to quantitative disclosure about contingencies. Under the current standard, a company is required to disclose its estimate of loss (or range of loss) only when a reasonable estimate can be made. Under the proposed standard, unless the amount of the claim or assessment is known,[11] a company would be required to disclose its best estimate of the maximum exposure to loss, even if it lacks sufficient information to make a reasonable estimate. In many cases complaints filed in litigation do not set forth a specified amount of damages, and in some jurisdictions specifying an amount of damages is not permitted.[12] The FASB's proposal does not address that fact and the resulting situation that companies will be required in a very significant number of cases to estimate losses. Moreover, although disclosure of a company's best estimate of its anticipated loss (or range of loss) would not be mandatory, in practice a company operating under the new standard may feel compelled to disclose its estimate to place the maximum possible loss in context, particularly when that maximum loss itself is an estimate because there is no stated claim or assessment.

The proposed changes to the disclosure requirements could adversely affect a company in a number of ways. The most obvious is the information it will provide to the

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disclosure because such offers often expire quickly and may not reflect the status of negotiations only a short time later. The FASB requests comment on the adopted approach.

[11] The proposed standard would require a company to disclose the amount of the claim or assessment, if known. In its commentary on the proposed standard, the FASB asserts that "[t]he amount of the claim is an objective amount that often can be determined by reference to court documents, which are publicly available" and reasons that "it would not be prejudicial to disclose such amount." Exposure Draft at par. A15. In practice, as we note above, many complaints do not specify an amount of money damages. Even where an amount is specified, it rarely corresponds to the amount actually recovered. Even where claimed amounts are a matter of public record, requiring a company to disclose them in the financial statements may prejudice a company by offering plaintiffs a new platform to publicize such claims.

[12] See, e.g., N.J. R. Civ. Prac. 4:5-2 ("If unliquidated money damages are claimed in any court, other than the Special Civil Part, the pleading shall demand damages generally without specifying the amount."); Wis. Stat. § 802.02(1m) ("With respect to a tort claim seeking the recovery of money, the demand for judgment may not specify the amount the pleader seeks"). Certain other states permit a plaintiff to plead only that the amount claimed exceeds a minimum amount. See, e.g., 735 Ill. Comp. Stat. 5/2-604 ("Every complaint and counterclaim shall contain specific prayers for relief… except that in actions for injury to the person, no ad damnum may be pleaded except to the minimum extent necessary to comply with the circuit rules of assignment…").

company's adversaries in a pending litigation or, under certain circumstances, to a potential adversary that has not yet even asserted a claim. To reduce the informational advantage this disclosure will provide to adversaries in litigation or prospective litigation, a company may be expected to err on the low side when making its estimate. Yet doing so will expose the company to further litigation if the actual amount of the charge differs materially from the estimated amount.

In its commentary on the proposed standard, the FASB acknowledges that it will sometimes be difficult for a company to make an estimate, but reasons that investors would "prefer to have a highly uncertain estimate supplemented with a qualitative description than no quantification of a potential loss as commonly occurs in existing practice."[13] As we note below, this is highly debatable; financial statement users often are existing investors in a company and might well prefer disclosure that does not impair a company's ability to minimize (or avoid entirely) litigation exposure.[14] Further, any estimate made under such conditions is likely to convey a false sense of certainty about the range of loss, which may well outweigh its utility.

Mandatory Qualitative Disclosure. Current accounting standards require a company to provide information about the nature of loss contingencies that are more than remote, but do not include detailed disclosure requirements. The proposed standard would significantly expand the required disclosure. Under the proposed standard, a company would be required to provide sufficient qualitative information about any contingency for which disclosure is required to enable users to understand the risks posed to the entity. The following minimum disclosure would be required:

- a description of the contingency, including how it arose, its legal or contractual basis, its current status and the anticipated timing of its resolution;

- a description of the factors that are likely to affect the ultimate outcome of the contingency along with their potential effect on the outcome;

- the company's qualitative assessment of the most likely outcome of the contingency; and

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[13] Exposure Draft at par. A16.

[14] The FASB acknowledges that shareholders represent a significant financial statement user constituency, but does not appear to give adequate weight to the potential harm to the interests of such users the proposed standard might raise. Exposure Draft at par. A27.

- o significant assumptions made in estimating the amounts disclosed and in assessing the most likely outcome.

The proposed rule contemplates disclosure of precisely the type of information that for centuries has been protected by the attorney work product and attorney client privilege doctrines and thus risks upsetting the careful balance established in law between the information that must be disclosed and the information that may be withheld from an adversary. If adopted as proposed, these disclosure requirements – other than the descriptive elements of the first bullet[15] – will likely provide a roadmap for plaintiffs that in at least many cases will prejudice a company's litigation posture. A company's assessment of the likelihood of success or range of loss from a proceeding may be affected by a myriad of factors, including its assessment of facts that are capable of being proved to a judge or jury, its analysis of applicable law and the application of the law to the expected facts, the expected litigation strategy of its adversary, the company's assessment of the court or jury, and many other factors. These factors are often uncertain or otherwise ill suited to public disclosure, and requiring their disclosure may force a company to make admissions against its interest or otherwise aid its adversaries. Beyond the adverse litigation impact, the disclosure would likely prove highly difficult to draft, particularly during the early stages of litigation, when the facts and legal analysis have not yet been fully developed. Moreover, a company's analysis of a case often changes during the course of the proceeding – the proposed disclosure requirements could effectively require a company to provide a running description of its changing views about the case, and risk further litigation as those views change, even if those changes are sensible responses to changed circumstances.

The interest the FASB has identified for increased disclosure properly should be balanced against the prejudice such disclosure will produce. Striking the right balance in this context is analogous to the balance the SEC struck in the preliminary merger negotiations context.[16] There, the SEC recognized that the information needs of investors must be balanced against the risk that premature disclosure of negotiations may jeopardize completion of the transaction. The SEC's MD&A disclosure rules, for example, permit a company engaged in undisclosed preliminary merger negotiations to omit disclosure of the transaction where premature disclosure would jeopardize the completion of the transaction.

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[15] Even the first bullet could be problematic in the context of an unasserted claim. For example, a material protection for companies is an adversary's obligation to set forth certain facts in a pleading "with particularity." Providing details via financial statement footnotes might undermine that protection, reduce the likelihood of success on motions to dismiss, and accordingly expose a company to significant discovery and other costs it might otherwise avoid.

[16] SEC Interpretation, *Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures,* SEC Release Nos. 33-6835; 34-26831; IC-16961; FR-36 (May 18, 1989), *available at* http://www.sec.gov/rules/interp/33-6835.htm.

We believe a similar balancing approach should apply when formulating disclosure rules for litigation contingencies. In the cost-benefit analysis for its proposed standard, the FASB places great weight on the desire for information expressed by financial statement users. It fails to acknowledge adequately, however, the significant harm to a company's litigation posture (and the associated harm to investors) that may be triggered by disclosure that is necessarily predictive or judgmental rather than factual.

Disclosure of Insurance and Indemnification Arrangements. The proposed standard would also require a qualitative and quantitative description of the terms of relevant insurance or indemnification arrangements that could lead to a recovery of some or all of the possible loss, including any caps, limitations, or deductibles that could affect the amount of recovery. This information may not be readily available, particularly during the early stages of litigation, and requiring potentially premature public disclosure of a company's analysis and strategy relating to such items could in some cases lessen a company's ability to recover. It may also be burdensome to provide such disclosure, particularly where a company has many proceedings underway.

Tabular Reconciliation Requirement. In addition to the foregoing, a company would be required to include, for each period for which a statement of income is presented, a reconciliation, in tabular format, of the total amount recognized in the aggregate for loss contingencies in its statement of financial position at the beginning and end of the period. The reconciliation would include, at a minimum:

- increases for loss contingencies recognized during the period;
- increases resulting from changes in estimates of the amounts of loss contingencies previously recognized;
- decreases resulting from changes in estimates or derecognition of loss contingencies previously recognized; and
- decreases resulting from cash payments (or other forms of settlement) for loss contingencies.

A company would be required to provide a qualitative description of the significant activity in the reconciliation and to disclose the line items in the statement of financial position in which recognized loss contingencies are included. A company would also be required to disclose the total amount of recoveries from insurance or indemnification arrangements recognized in each statement of financial position and statement of income presented that are related to the loss contingencies included in the tabular reconciliation.

Limited Exception for Prejudicial Information. The proposed standard contemplates a two-step process for addressing disclosure of information about a contingency that would be prejudicial to the company's position.[17] First, the proposed standard would allow a company to aggregate the disclosures at a level higher than by the nature of the contingency in an effort to ensure that the aggregated information is not prejudicial. In the "rare" instances in which the aggregated information or the tabular reconciliation would still be prejudicial (for example, if the entity is involved in only one legal dispute), the company would be permitted to proceed to the second step, under which it could forego disclosing only that information that would be prejudicial to its position. If information is aggregated or omitted, the company would be required to disclose the fact that information has not been disclosed and the reason why. Notwithstanding the foregoing, the proposed standard would make disclosure of the following items mandatory for any otherwise disclosable loss contingency regardless of the potential prejudice from such disclosure or an inability to aggregate information at a level sufficient to avoid such prejudice:

- the amount of the claim or assessment (or if there is no claim or assessment, an estimate of the entity's maximum exposure to loss);

- a description of the loss contingency, including how it arose, its legal or contractual basis, its current status, and the anticipated timing of its resolution; and

- a description of the factors that are likely to affect the ultimate outcome of the contingency along with the potential impact on the outcome.

As proposed, the required minimum disclosure would significantly reduce the utility of the exception for prejudicial information, and in many cases may render it largely useless as a practical matter, because the minimum disclosure required more often than not will include the very information that is prejudicial.[18] Moreover, while the proposed standard's

[17] The proposed standard defines "prejudicial" to mean disclosure that could affect, to the company's detriment, the outcome of the contingency itself.

[18] The FASB intends that the prejudicial information exemption will be used "rarely", which further limits its utility. The Exposure Draft notes that the corresponding standard in IAS 37 provides that the circumstances under which the prejudicial information exemption may be exercised are expected to be "extremely" rare. The proposed standard uses the term "rare" because the FASB was concerned that the term "extremely rare" might result in an overly narrow interpretation of the exemption's availability. To emphasize the point, the proposed standard includes a footnote that states that "rare" is not intended to mean "never" and that the determination of when it is appropriate to exercise the exemption is a matter of significant judgment that depends on the facts and circumstances. Whatever the formulation, in practice the exemption is likely to be needed far more frequently than the FASB suggests.

permitted aggregation of claims might appear promising in the abstract, it is unclear that it would be an effective remedy in practice. Where a company is involved in a single legal dispute, for example, aggregation will be impossible. Even when aggregated with one or more smaller claims, it will often be evident that a particular claim accounts for the bulk of an aggregated provision. Moreover, the detailed description of the legal and factual background of a contingency and the factors likely to affect the ultimate outcome are matters that are inherently case specific, which makes the required information ill-suited to aggregation.

Subsequent Events. If information after the date of the financial statements but before the financial statements are issued becomes available indicating that a liability was incurred after the date of the financial statements or that it is more than remote that a liability was so incurred, a company would be required to provide the full set of disclosures for that contingency (other than the tabular reconciliation) described above. If the loss arising after the date of the financials can be reasonably estimated, a company would be permitted to include pro forma financial data to give effect to the loss as if it had occurred at the date of the financial statements.

Effective Date. The FASB proposes that the amendments would be effective for annual financial statements ending after December 15, 2008 and interim and annual periods in subsequent fiscal years. The tabular reconciliation would not be required for earlier periods provided for comparative purposes. The FASB is proposing to conduct "field tests" of the proposed standard and seeks volunteers for such tests in the proposal.

Scope of the Proposed Standard. The proposed standard would replace the disclosure requirements in SFAS 5 for loss contingencies that are recognized as liabilities in a statement of financial position and for unrecognized loss contingencies that would be recognized as liabilities if the criteria for recognition under SFAS 5 were met. It would not change the disclosure requirements for loss contingencies that are (or would be) recognized as asset impairments.[19] The proposed standard would also apply to loss contingencies recognized in a business combination accounted for under SFAS 141(R), *Business Combinations.*

[19] Other categories that would continue to be analyzed under the prior standards include liabilities for employment related costs, FIN 45 guarantees and certain insurance-related items.

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