



September 20, 2010

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

Re: *File Reference No. 1840-100, Proposed Accounting Standards Update, "Disclosure of Certain Loss Contingencies"*

Dear Mr. Golden:

This comment letter is submitted by the American Financial Services Association ("AFSA") in response to the request for comment on the Proposed Accounting Standards Update, "Disclosure of Certain Loss Contingencies" (the "Update") as issued by the Financial Accounting Standards Board ("FASB") on July 20, 2010. AFSA appreciates the opportunity to provide its comments.

AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers. Many of AFSA's members are nongovernmental entities that provide decision-useful information to investors and other users of financial reports and so fall under the jurisdiction of FASB.

AFSA understands that the objective of FASB in issuing the Update is to expand and enhance disclosures to help users of financial statements make their own assessments about the possible outcomes of a loss contingency. AFSA supports providing adequate and timely information to assist investors and other users of financial reporting in assessing the likelihood, timing, and magnitude of future cash outflows associated with loss contingencies. However, AFSA believes that the proposed disclosures required by the Update would not provide investors and other users of financial reporting with useful and beneficial information, but on the contrary, would adversely affect financial services companies, which has broad implications for consumers and the economy as a whole.

We believe that the current Topic 450 guidance has served financial statement users well for over thirty years and achieves the objective outlined by FASB. The existing disclosure

requirements provide adequate levels of information to assist investors and users of financial statements in assessing the nature, potential magnitude, and timing of loss contingencies. Instead of benefiting from more useful information, users of financial statements would have to weed through much additional, and likely unreliable, information. We do not believe that concerns expressed in the Update outweigh the significant harm that would be done to financial services companies and other reporting entities. These concerns (that some issuers of financial statements have not disclosed a litigation contingency until a material accrual is recognized, the limited universe of contingencies disclosed under the “reasonably possible” threshold, the assertion by issuers that a reasonable estimate cannot be made, and an alleged lack of transparency about litigation reserves) reflect not an attempt to avoid transparency, but merely the highly uncertain nature inherent in the litigation process.

In the Update, FASB recognized the negative consequences to reporting entities of its June 2008 Exposure Draft (“Draft”). FASB acknowledged some concerns that the Draft, “would be difficult, if not impossible, to meet the ... disclosure objective because it would require information that is predictive in nature and does not adequately take into account the inherent uncertain nature of loss contingencies, especially those related to ongoing litigation.”¹ Although, FASB claims that the “revised disclosure objective recognizes the uncertainty inherent in predicting the amount of future cash flows by referring to both qualitative and quantitative information,”² AFSA believes that the concerns expressed in the Draft are still valid. Although some of the most prejudicial and burdensome amendments have been removed, many concerns remain.

AFSA understands that FASB believes that, “investors and other users of financial reporting have expressed concerns that disclosure about loss contingencies under the existing guidance on contingencies in Topic 450 do not provide adequate and timely information to assist them...”³ However, AFSA is concerned with the lack of specificity in the investors requests. We believe that, unfortunately, FASB is attempting to address only a narrow range of investor interests at the expense of all other investors.

The amount of information the Update requires entities to disclose will not be helpful to investors. The required disclosures contain remote contingent liabilities and unverified claims and assessments, in addition to causing prejudicial information to be released publicly. Because the disclosures cover uncertainties, which may never evolve into meaningful contingencies, they will not help investors and other users of financial reports assess the likelihood, timing, and magnitude of future cash outflows associated with loss contingencies. Moreover, initial damages claimed in a lawsuit are often exorbitant and do not have a relationship to the final outcome or settlement. If investors rely on the false picture drawn by these disclosures, they will draw erroneous conclusions. Investors cannot assess future contingency outcomes using the information in the proposed disclosures because the level of precision aimed for in the

¹ Update, Paragraph BC6

² Update, Paragraph BC8

³ Update, Pg. 1

Update simply does not exist. It is impossible to predict the precise outcome of litigation. Instead, investors may become overwhelmed by the number of contingencies disclosed and have little frame of reference as they try to determine the relative importance of each litigation matter.

Not only will the disclosures be misleading to investors, entities that have to comply with the amendments in the Update will suffer. AFSA believes that disclosure about concrete, not speculative, liabilities is often useful to investors. The Update, though, would force companies to publish too much speculative and non-public information. Entities that must issue these disclosures, like financial services companies, are not the only entities harmed by these requirements. What harms a company also harms that company's investors and customers.

Requiring entities to disclose the proposed qualitative and quantitative information about loss contingencies as prescribed in the Update unfairly aids plaintiffs and therefore goes against the very nature of the adversarial legal system. The Update requires entities to disclose not only information already disclosed to plaintiffs, but also information that might eventually be "discoverable" by plaintiffs. Plaintiffs could, and likely will, use the information in the disclosures to ascertain an entity's legal strategies, particularly, its settlement strategies. As the Wall Street Journal noted, "Supporters insist this is merely about disclosure, but the proposal would hurt investors by offering roadmaps for new litigation and bigger settlements."⁴

The information in the proposed disclosures could be used by plaintiffs to increase their leverage over entity's reporting the information because the plaintiffs would be able to target their damage requests to the maximum amount of coverage allowed under the entity's insurance plan. This will lead to many new, and much larger, lawsuits. Plaintiffs will claim excessive damages in order to gain larger settlements. Plaintiffs could also use the disclosed information to file new lawsuits when they learn that more insurance money remains. Many judges realize that putting this information in plaintiffs' hands will lead to such a result and so typically insist that coverage only be divulged under a secrecy order. Additionally, the Update will encourage companies to settle frivolous lawsuits to avoid disclosing significant claims where the likelihood of recovery is remote. As companies settle more frivolous lawsuits, plaintiffs will file an increased number of them, an outcome that FASB surely wants to avoid.

The required tabular reconciliation disclosure will be most useful to plaintiffs. FASB acknowledges that, "... some preparers and attorneys argued that a detailed quantitative disclosure may be prejudicial to the reporting entity."⁵ AFSA understands that FASB, "decided to retain the tabular reconciliation disclosure requirement with a clarification that it would be presented separately for each class of contingencies so that dissimilar contingencies are not aggregated ... to address concerns about prejudicial disclosure of individual contingencies."⁶

⁴ FASB's Tort Bar Gift. *The Wall Street Journal*. Aug. 18, 2010.

⁵ Update, Paragraph BC31

⁶ Ibid.

Even with that change, though, AFSA believes that plaintiffs can monitor the change in accruals, and accompanying explanation, to gain important insight into an entity's litigation strategy.

Paragraph 450-20-55-1D requires that "if disclosures are provided on an aggregated basis, an entity should disclose information that would enable financial statement users to understand the nature, potential magnitude, and potential timing (if known) of loss contingencies." This could include disclosing the average settlement amount. Although disclosing the average settlement amount seems as though it would not be detrimental, there is a good reason why judges usually keep this information confidential. Disclosures including settlement amounts, even average settlement amounts, would provide valuable information to plaintiffs who would try to meet or exceed that number with each lawsuit. This sets a very prejudicial standard. FASB even recognized this concern in its commentary on the rule:

A few user comment letter respondents supported requiring disclosure of settlement offers. Those respondents stated that if settlement offers were disclosed, then it would be an indicator of potential lower and upper boundaries of the possible outcomes. However, the majority of respondents agreed with the Board's decision not to require disclosure of settlement offers. Those who supported the Board's decision stated that disclosing settlement offers could be misleading because they are often used as a negotiating tool and may significantly differ from the entity's ultimate exposure. A few respondents noted that disclosing such offers is prejudicial, as evidenced by the fact that information about such offers is inadmissible in court under the Federal Rule of Evidence and state law.⁷

Even though specific settlement offers would not need to be disclosed, the disclosure of average settlement offers would have the same effect as the outcomes described above. In addition, if a company only had one outstanding case within a particular class, the detailed nature of the tabular reconciliation could result in the disclosure of prejudicial information since there would be no aggregation.

Interestingly, not only would reporting entities have to disclose their legal strategies, they would, as avowed by the Wall Street Journal, "be obliged to do the trial bar's research."⁸ The Update states, "An entity may be aware of the existence of studies in reputable scientific journals (or other credible sources that other entities in the same industry generally review) that indicate potential significant hazards related to the entity's products or operations. In such circumstances, an assessment must first be made as to whether the assertion of a claim is probable."⁹ This is tantamount to asking companies to advertise their potential vulnerability to lawsuits.

Also, the Update mandates the disclosure of much information that is covered under attorney-client privilege, one of the oldest privileges for confidential communications.

Another potential problem with the Update is that it requires disclosure of what might have to be reported to regulators, without even spelling out what kind of regulators FASB has in mind

⁷ Update, Paragraph BC44

⁸ FASB's Tort Bar Gift. *The Wall Street Journal*. Aug. 18, 2010.

⁹ Update, Paragraph 450-20-55-14(d)

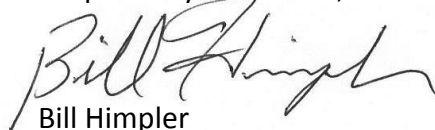
when imposing this kind of requirement. This poses not only compliance problems for financial institutions, but the Update could run afoul of regulatory requirements prohibiting public disclosure of information that was disclosed to banking regulators as part of their regulatory reviews.

As noted in the Update, “the objective of financial reporting is to provide information that is useful to present and potential investors, creditors, donors, and other capital market participants in making rational investment, credit, and similar resource allocation decisions. However, the benefits of providing information for that purpose should justify the related costs.”¹⁰ This Update clearly does not justify the extreme costs imposed on reporting entities. FASB did not look at the whole picture when making its determination as to whether the benefits of the proposal outweigh the costs. FASB only looked at the actual cost of providing the additional disclosure requirements.¹¹ While that is expensive, the true cost of the regulation will come in the form of increased litigation – the cost for both in-house attorneys and outside counsel, as well as the increased settlement amounts. These costs are coming on top of the cost to implement numerous other new compliance requirements, such as the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Adding significant costs, compliance obligations and increased litigation risk onto reporting entities, such as financial services companies, is bad for the economy in general and, at a time when the economy is struggling to recover after the economic crisis and when some economists are worried that another recession is imminent, this proposal has the very high potential to be catastrophic. AFSA strongly recommends that FASB reject the proposed Update.

We thank FASB for the opportunity to comment. Please feel free to contact me with any questions at 202-296-5544 or bhimpler@afsamail.org.

Respectfully submitted,



Bill Himpler
Executive Vice President
American Financial Services Association

¹⁰ Update, Paragraph BC49

¹¹ Update, Paragraph BC 50