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Via E-Mail To director@fasb.org

LETTER OF COMMENT NO. 156

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File Reference No. 1600-100 – “Exposure Draft, Proposed Statement of Financial Accounting Standards, Disclosure of Certain Loss Contingencies, an amendment of FASB Statements No. 5 and 141(R)”

Dear Mr. Golden:

The six leading pharmaceutical companies submitting this letter – Eli Lilly & Co.; Johnson & Johnson; Merck & Co., Inc.; Novartis Pharmaceuticals Corporation; Pfizer Inc.; and Wyeth – make products that benefit millions of patients. Along with their benefits, however, our products *inevitably hold some degree of risk, and achieving the proper benefit/risk balance is the essence of our business.* Because of these risks, our broad interaction with the public, and the litigiousness of our society, we are particularly susceptible to being named as defendants in large numbers of lawsuits. Our companies are currently defending a wide range of lawsuits, including tens of thousands of product liability lawsuits. Collectively, we have defended hundreds of thousands of product liability claims over the course of the last decade.

We share concerns others have raised in comments on the “Exposure Draft, Proposed Statement of Financial Accounting Standards, Disclosure of Certain Loss Contingencies.” In particular, we are concerned that the new disclosure rules will undermine the attorney-client privilege and work product protection and, more generally, will tilt the litigation balance in favor of disclosing companies’ litigation adversaries and, thus, work to the ultimate detriment of our shareholders without providing meaningful disclosure to investors.

We write separately, however, to provide FASB our unique perspective as mass tort defendants. While the Exposure Draft's disclosure requirements are, in our view, a poor fit with the inherent uncertainties that underlie all types of litigation, these problems are highlighted in the mass tort context. As detailed below, mass tort defendants often lack the most basic information about plaintiffs who are asserting claims. A mass tort may develop, multiply, diminish, or disappear based on a host of procedural or legal rulings, fact-findings, and other events, none of which can be predicted in advance. Due to a mass tort's sheer volume, it would be extremely difficult to estimate our litigation adversaries' possible recoveries and keep thousands of estimates current and accurate, every 90 days (or more often), as circumstances change. And the estimates would be highly subjective, subject to huge swings as underlying assumptions change, and unlikely to provide financial statement users with meaningful or reliable information. In light of these problems, as well as those identified in comment letters submitted by others, we believe the Board should withdraw the Exposure Draft.

What Is A Mass Tort?

A mass tort has been defined as litigation involving "large numbers of geographically dispersed persons," generally alleging that exposure to a product "g[a]ve rise to a latent disease."¹ Examples of mass torts in general include the asbestos, silica, and tobacco litigation. In the pharmaceutical and medical device fields, the litigation involving silicone gel breast implants, diet drugs (or "fen-phen"), and Vioxx are prominent examples of mass torts.

Many different events may trigger mass torts. They may be prompted by a voluntary product withdrawal, as happened in the diet drug cases and with the pain reliever Vioxx. Or mass torts may be prompted by an article in the scientific literature that focuses on purported safety concerns, as happened in the phenylpropanolamine (or "PPA") and hormone replacement therapy (or "HRT") cases.

But mass torts may also be prompted by events plainly unrelated to product safety. Aberrationally large jury verdicts can prompt massive litigation, as happened when Wisconsin and Texas state court juries returned, respectively, \$1 million and \$5 million verdicts in latex glove actions.² A handful of parents of autistic children have, by joining forces over the internet, promoted an anti-vaccine movement that has led to hundreds of lawsuits alleging that thimerosal-containing vaccines cause autism. Sensationalized media coverage also frequently

¹ Richard A. Nagareda, "Gun Litigation In The Mass Tort Context" in *Suing The Gun Industry: A Battle At the Crossroads of Gun Control and Mass Torts* at 178 (Timothy D. Lytton ed. 2005) (footnote omitted).

² See *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727 (Wis. 2001) (affirming \$1 million plaintiff's verdict in action involving latex gloves); *Goolsby v. Baxter Healthcare Corp.*, No. D-148,574, 2001 WL 35818167 (Dist. Ct. Jefferson County, Tex. Sept. 28, 2001) (final judgment after settlement of latex gloves case in which jury had awarded \$5 million in punitive damages).

triggers mass tort litigation, as an episode of “20/20” did in the orthopedic bone screw litigation and NBC’s “Dateline” did in the Neurontin litigation. Sometimes these events work in tandem to trigger mass torts, as a combination of an episode of “Face to Face With Connie Chung,” a moratorium declared by the Food and Drug Administration, and the \$7.3 million jury verdict in *Hopkins* did for breast implants. And one mass tort may beget another, as the silicone gel breast implant litigation spawned the Norplant birth control device litigation, simply because Norplant administered its progestin through an implanted, hardened silicone elastomer.

Once a trigger occurs, the vagaries of the legal system primarily determine whether litigation remains limited in scope or becomes a mass tort. As one plaintiff’s lawyer has candidly admitted, “A mass tort occurs when the plaintiffs’ bar decides to invest in it.” Michael J. Grinfeld, “Fat city: Diet drugs, once a fad for the masses, becomes a mass tort,” *California Lawyer* 47, 48 (Aug. 1998).

The Defendant Often Has Little Information About Particular Mass Tort Cases

Once mass torts begin, they can grow explosively, which in turn affects the timing and amount of plaintiff-specific information available to the defendant. Plaintiffs’ counsel may organize into loose networks to better prosecute the actions across the country or compete with one another to enroll as clients as many people as possible. Mass media client solicitations seeking those “exposed” to the product or suffering from a wide range of maladies are commonplace. Plaintiffs and their counsel often have never met, and “client meetings” may be nothing more than e-mail intake forms or phone calls to call centers.³ Typically, neither the plaintiffs nor their counsel have collected the relevant medical records, much less had them evaluated by an expert.

Any particular mass tort plaintiff thus may never have ingested the defendant’s drug; if the plaintiff ingested the drug, the plaintiff may not have suffered any injury; if a plaintiff ingested the drug and suffered an injury, the injury may not have been related to the claimed

³ As the ABA’s Tort Trial and Insurance Practice Section’s Task Force on Contingent Fees observed in the 2004 study “Contingent Fees in Mass Tort Litigation” (at 112-13) –

Plaintiffs’ lawyers need many cases for mass torts to be profitable... Plaintiffs’ lawyer George Fleming made a presentation to the Task Force about how his practice is organized to be able to communicate with thousands of clients and conduct discovery efficiently in all their cases. He has 36,000 square feet of office space, 250 employees, 100 staff lawyers, receptionists who can answer the phone in three languages, and a computer system that is comparable to the one that Southwest Airlines uses to manage its reservations. He has 100 workstations equipped to enable a staff lawyer to conduct telephonic depositions. His practice requires 22,000 square feet of off-site storage and a staff of ten just to manage the flow paper. To send one standard letter to each of his clients in one mass tort case he handled cost his firm \$20,000 in printing and postage.

defect. More than 2,000 plaintiffs, for example, brought lawsuits against Novartis in the HRT litigation; nearly all were later dismissed because the plaintiffs had not used Novartis' products. In the Neurontin litigation, an order requiring plaintiffs' counsel to certify such basic facts as having conferred with the individual plaintiff and having reviewed the relevant medical records caused 140 of approximately 400 pending cases to be dismissed.

But a mass tort may proceed in litigation for years without the defendant being able to make meaningful, plaintiff-specific factual evaluations and damage assessments. That is so for at least six reasons. *First*, whatever facts the plaintiffs (or their counsel) may know at the outset are often not communicated to the defendant in the complaint. Plaintiffs' counsel often copy complaints *verbatim* from earlier pleadings, customizing the new documents only to change the plaintiff's name. These boilerplate complaints reveal nothing about the individual plaintiff's medical history, exposure to the drug, or alleged injuries.

Indeed, for administrative ease, courts may authorize "short-form" complaints that provide plaintiffs' names but otherwise contain little or no plaintiff-specific information. In yet other situations, plaintiffs' counsel may name literally hundreds or even thousands of plaintiffs in a single complaint and provide no details about any individual plaintiff. In the diet drug cases, Wyeth often received mass complaints only vaguely alleging the problem. For example, one Mississippi complaint filed by 175 plaintiffs alleged, in a single sentence, that they all suffered from one "or more" of 20 different side effects. Those side effects ranged from trivial problems unrelated to the drugs to one serious, but exceedingly rare, condition that was associated with the drugs. Yet for months, there was no way to sort out which, if any, of those 175 plaintiffs in fact had that serious condition. In the multidistrict PPA litigation, 29 cases attempted "to join over 1000 plaintiffs," including a single case "accounting for over 500 PPA plaintiffs." *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1225 (9th Cir.), *cert. denied*, 127 S. Ct. 244 (2006). In the Celebrex litigation, one complaint named approximately 945 plaintiffs, with no information about the dose or duration of ingestion of the drug, or nature of the claimed injury, for any of them. And in the Norplant litigation, one lawyer served a single complaint that named more than 3,000 plaintiffs, but provided essentially no medical information about any of them.

Second, if a complaint pleads basic medical facts about a plaintiff, the complaint is unlikely to have meaningful information about the damages claimed. In many states, statutes or rules forbid plaintiffs from specifying in a complaint the damages they seek. *See, e.g.*, Cal. Civ. Proc. Code § 425.10; N.Y. C.P.L.R. § 3017(c). When plaintiffs are permitted to plead specific damage amounts, plaintiffs often overstate them – either for the supposed *in terrorem* effect on the defendant or to avoid pleading less than might be recoverable at trial and so inadvertently limiting the size of a verdict.

Third, defendants may be barred from taking plaintiff-specific discovery for long periods. Courts faced with the huge volume of cases presented by a mass tort will sometimes try an

initial, small set of “bellwether” cases as exemplars. Those courts often permit significant discovery only as to the bellwether plaintiffs and postpone or limit discovery of other plaintiffs, which precludes defendants from learning plaintiff-specific facts underlying huge numbers of claims.

Fourth, once plaintiff-specific discovery begins, defendants often receive information in fits and starts, with little information arriving initially and torrents of information arriving as deadlines approach. For example, courts often set deadlines for plaintiffs to complete questionnaires providing basic factual information about their claims. A defendant is likely to receive few responses to those questionnaires for weeks or months, and then to receive hundreds or thousands *en masse* on the date the forms are due. And experience has shown that the responses provided to those questionnaires are often incomplete at best. In the PPA litigation, “many plaintiffs . . . failed to comply with [the] requirement to complete a Plaintiff’s Fact Sheet,” which resulted in “more than 850 claims” being dismissed. *PPA*, 460 F.3d at 1224, 1226 n.4. In our experience, the initial fact sheets provided in mass torts are often incomplete or later prove to be at odds with medical records or treating physicians’ testimony.

Fifth, completing discovery relating to a particular plaintiff may take not just months, but years. After a defendant receives basic factual information about a plaintiff’s claim, the defendant can begin to collect medical records from treating physicians. Those records must be obtained from multiple sources and can number in the thousands of pages for plaintiffs with complex medical histories. When medical records relating to hundreds – or thousands – of plaintiffs begin to arrive, reviewing those records poses logistical issues. But the medical records are only the start and may shed little light on the merits of the plaintiffs’ claims. Many times, relevant facts become clear only after the plaintiff undergoes an independent medical examination. And scheduling and completing depositions of persons with relevant knowledge – such as plaintiffs, family members, and medical providers – takes additional time.

Sixth, mass torts often have an “echo.” After a triggering event occurs, some plaintiffs’ counsel file complaints, but others defer filing complaints to postpone incurring legal expenses. Those deferred complaints, however, must be filed before the applicable statutes of limitations expire, which would cause the plaintiffs’ claims to be lost. Accordingly, new complaints in a seemingly “mature” mass tort arrive *en masse* just before statutes of limitations are perceived to be expiring. Many states have two-year limitations periods for product liability claims, so many new complaints are often filed just before the second anniversary of the triggering event. And there can be additional echoes as plaintiffs file suit in states with longer statutes of limitations just before later anniversaries of the triggering event.

Once mass tort claims are investigated, many – in some mass torts, most – claims prove to be meritless. For example, Pfizer paid nothing to nearly 40% – roughly 22,000 – of the 56,000 Rezulin plaintiffs and claimants. Bayer ultimately paid only 3,100 out of roughly 40,000 claimants who filed product liability claims relating to the use of Baycol. Wyeth paid only 507

out of its 3,437 PPA claimants. And some claims are simply fraudulent. One diet drug plaintiff alleged that she took the drug seven years before it was marketed, that it was prescribed by a physician who did not exist, and that she purchased it from a pharmacy located at an address that was a parking lot and then a bar. *In re Diet Drugs Prods. Liab. Litig.*, 381 F. Supp. 2d 421, 423 (E.D. Pa. 2005).⁴ None of these results, however, could have been predicted at the times the complaints were filed.

Legal And Factual Uncertainty Pervades Mass Torts

While all litigation is affected by uncertainty, procedural and substantive legal rulings in mass tort litigation can be transformational.

Procedurally, mass tort defendants often do not know even the particular judge who will preside over pretrial proceedings. That is because mass torts typically involve proceedings before the Judicial Panel on Multidistrict Litigation, which decides whether to transfer related cases to a single judge for coordinated pretrial proceedings. If the MDL Panel decides to coordinate a set of cases, the Panel has essentially unfettered discretion to select a transferee district. The Panel occasionally transfers cases to completely unpredictable locations, to be heard before judges with no previous connection to the litigation. For example, the Panel transferred the breast implant cases to Judge Sam Pointer in Alabama and the Albuterol cases to Judge Clarence Brimmer in Wyoming, neither of whom had previously been involved in those litigations.

The MDL Panel's choice in that regard can dramatically affect the litigation. Among other things, local federal appellate law governs federal issues in multidistrict litigation. *See, e.g., In re Korean Airlines*, 829 F.2d 1171 (D.C. Cir. 1987). Federal law can be dispositive of particular claims or entire cases (as is true, for example, of the doctrine of preemption), and federal law can vary by circuit. Thus, if the MDL Panel transfers cases to a trial court in a circuit that recognizes the preemption defense on a particular set of facts, the litigation may be slowed or stopped in its tracks. If, however, the MDL Panel transfers the cases to a court that does not recognize this defense, the litigation may continue unabated.

Similarly, decisions whether to certify a class of plaintiffs lie within the trial court's broad discretion; that decision can in a heartbeat dramatically change the scope and significance of the cases. But companies cannot predict whether courts will certify a class action. In the Rezulin litigation, for example, Texas and California state courts denied motions for class certification, but a West Virginia court granted one.

⁴ A particularly well known instance of mass tort fraud was in the silica cases, where plaintiffs filed more than 20,000 cases only to have them largely disappear after a federal judge found that "virtually all of the diagnoses fail to satisfy the minimum, medically-acceptable criteria for the diagnosis of silicosis." *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 625 (S.D. Tex. 2005).

Matters as seemingly mundane as scheduling trial dates can dramatically affect cases. Dow Corning, for example, has said publicly that it was forced to file for bankruptcy in part because of the trial dates chosen by judges. The company was unable to field necessary trial teams and witnesses for the upcoming trials, whether or not particular cases were defensible on the merits. See Richard Hazelton, "The Tort Monster That Ate Dow Corning," *The Wall Street Journal* A19 (May 17, 1995).

Unpredictable substantive rulings also can dramatically affect cases. For example, a motion for summary judgment can eliminate a case or set of cases. But some federal judges will grant, and others will deny, motions seeking summary judgment on the ground of federal preemption. Compare, e.g., *Mason v. SmithKline Beecham Corp.*, 546 F. Supp. 2d 618 (C.D. Ill. 2008) (granting summary judgment on ground of preemption), with *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 776 (E.D. La. 2007) (denying summary judgment sought on the basis of preemption). Indeed, in *Tucker v. SmithKline Beecham Corp.*, a single judge first granted and then reconsidered and denied a motion for summary judgment based on preemption. 2007 WL 2726259 (S.D. Ind. Sept. 19, 2007), reconsidered at 2008 WL 2788505 (S.D. Ind. July 17, 2008).

Similarly, evidentiary rulings, particularly those that either admit or exclude expert testimony, may be dispositive. The science underlying mass torts often relies on analogy, inference, or less. Federal courts evaluate the admissibility of expert testimony under federal law as interpreted by, among other decisions, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), while state courts apply their own laws that may differ. In the litigation involving claims that the drug Accutane causes inflammatory bowel disease, for example, New Jersey state court juries returned plaintiffs' verdicts in excess of \$2 million and \$10 million, while a Florida federal judge effectively terminated cases consolidated before him by excluding as unreliable the plaintiffs' experts' testimony supposedly linking the drug to the injury. See *In re Accutane Prods. Liab. Litig.*, 511 F. Supp. 2d 1288 (M.D. Fla. 2007).⁵

Rulings on other critical issues can be equally unpredictable. In the hormone replacement therapy cases, for example, courts have been asked to decide whether a cause of action accrues on the date a patient was diagnosed with cancer or on the later date when a scientific publication allegedly described the relationship between the drug and the injury. A Pennsylvania state judge adopted the former approach, while a federal judge adopted the latter.

⁵ Similarly, in the Parlodel litigation, many federal courts excluded plaintiffs' experts' testimony as unreliable. See, e.g., *Rider v. Sandoz Pharm. Corp.*, 295 F.3d 1194 (11th Cir. 2002) (affirming exclusion of plaintiff's expert's testimony); *Hollander v. Sandoz Pharms. Corp.*, 289 F.3d 1193 (10th Cir. 2002) (same). But other federal courts and some state courts have admitted such testimony. See, e.g., *Brasher v. Sandoz Pharms. Corp.*, 160 F. Supp. 2d 1291 (N.D. Ala. 2001) (denying motion to exclude plaintiff's expert's testimony); *Hyman & Armstrong, P.S.C. v. Gunderson*, No. 2006-SC-175, 2008 Ky. LEXIS 114 (Apr. 24, 2008) (affirming admission of plaintiff's expert's testimony and \$7.8 million plaintiff's verdict).

Compare Coleman v. Wyeth Pharms. Inc., No. 4229, 2007 Phila. Ct. Com. Pl. LEXIS 262 (Sept. 24, 2007), with *Scroggin v. Wyeth*, MDL No. 4:03CV1507, 2007 WL 3228125 (E.D. Ark. Nov. 1, 2007). Issues such as these may decide whether hundreds of cases survive a statute of limitations defense, yet companies cannot predict how courts will resolve these questions.

In the preceding examples, the interested defendant was at least named in the litigation. But substantive rulings in cases in which the defendant is *not* involved can also dramatically and unpredictably affect mass tort litigation. For example, the recent *McDarby v. Merck*, 949 A.2d 223 (N.J. Super. A.D. 2008), decision involved only Merck's drug Vioxx. The precedent set in that case interpreting a New Jersey statute may, however, affect all drug product liability cases pending in New Jersey state courts – which include thousands of cases pending against drug companies other than Merck. Similarly, *Wyeth v. Levine*, No. 06-1249 (U.S. *certiorari* granted Jan. 18, 2008), a case involving only the drug Phenergan, is pending in the United States Supreme Court. The decision in that case, which presents a preemption issue, may – or may not – affect all pharmaceutical product liability cases pending throughout the country. No one knows in advance.

It is not simply *legal* decisions in cases involving other defendants that render mass torts unpredictable. Unpredictable *strategic* decisions made by others can also dramatically affect a company's pending cases. Some mass tort litigation involves multiple defendants selling similar products. In those situations, one defendant's strategic choices can affect the perceived, or actual, strength of a co-defendant's cases. For example, one defendant's agreement to settle cases can be perceived as setting a ceiling (or, in other situations, a floor) on the value of the non-settling defendant's cases. Likewise, another defendant's decision to try a case can dramatically affect the potential value of similar claims against a co-defendant.

In addition to the many pretrial rulings and strategic choices before trial described above, the amounts of compensatory or punitive damages awarded at trial are also unpredictable. In the hormone replacement therapy cases, for example, Arkansas federal court juries returned defense verdicts in *Reeves* and *Rush*. But another Arkansas federal court jury awarded \$2.75 million in compensatory damages in *Scroggin*, and a Nevada state court jury awarded \$35.5 million in compensatory damages in *Rowatt*.

Punitive damage awards also have proven to be extremely unpredictable. Again in the hormone therapy litigation, one Arkansas federal court jury found no basis for compensatory damages, and hence no punitive damages (*Reeves*); another jury did not consider punitive damages because the trial court dismissed the punitive claims as a matter of law before jury deliberations (*Rush*); and a third deliberated on and awarded \$27 million in punitive damages, which the trial court subsequently set aside (*Scroggin*). In the breast implant litigation, jury awards ranged from defense verdicts in some cases to multimillion dollar verdicts, which included punitive damages, in the *Toole* (\$5.4 million), *Hopkins* (\$7.3 million), and *Johnson* (\$25 million) cases.

Another example is from the Vioxx litigation, which involved approximately 60,000 claims. The first Vioxx jury awarded a single plaintiff \$24 million in compensatory and \$229 million in punitive damages. The trial court reduced the verdict to \$26 million and the intermediate appellate court threw it out altogether, rendering judgment for the defendant. *Merck & Co. v. Ernst*, No. 14-06-835, 2008 Tex. App. LEXIS 3951 (Houston [14th Dist.] May 29, 2008). That one case ranged in “value” from over \$250 million at the time of the verdict to its current value of \$0 and is but one of many tens of thousands of similar cases.

Mass Torts Settlements Often Cannot Be Announced Until After the Agreements Are Executed

Many mass torts ultimately result in settlements, but settlement discussions must remain confidential before agreements are executed for at least four reasons. *First*, simply disclosing the fact that settlement is imminent may prompt the filing of more cases. Again and again, a mass tort settlement designed to terminate large-scale litigation has instead prompted new filings in numbers so large that the new filings have dwarfed the numbers resolved by the settlement. That is why some mass tort settlement agreements, such as the recent one involving Vioxx, specify that plaintiffs receive payments only if they had complaints on file as of the date the agreement was executed.⁶ If there were a requirement to speculate publicly about the outcome of potential settlement discussions before they reached fruition, it would be impossible to protect the companies against an avalanche of additional filings from plaintiffs who would not otherwise have sued, but who wish to participate in an anticipated settlement.

Second, some settlement agreements allow plaintiffs’ counsel to be paid contingent fees for clients retained before the mass tort settlement papers were signed, but only hourly fees for clients retained thereafter. Those agreements thus authorize higher fees to counsel who accepted cases involving a contingency – a possibility of not recovering for a plaintiff—than to counsel who accepted cases that involved no uncertainty, since the settlement agreement guaranteed a payment. AcroMed’s settlement in the *Orthopedic Bone Screw* litigation contained such a clause. Once again, premature disclosure of the terms of that settlement agreement would affect the conduct of the interested parties.

Third, a mass tort defendant often is negotiating settlements with many different plaintiffs’ counsel simultaneously. In those situations, disclosing the status of one negotiation could adversely affect another. The parties must maintain secrecy until a settlement is finalized.

Fourth, court-supervised settlement and mediation discussions often are subject to court-imposed rules prohibiting the disclosure of information exchanged during the negotiations.

⁶ Other settlement agreements, such as the one involved in *AmChem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), authorize payments only to potential claimants who had *not* yet filed complaints.

Accordingly, requiring participating defendants to disclose the substance of those discussions would place companies in an untenable position.

The Disclosures Required By The Exposure Draft Do Not Fit Mass Torts

The Exposure Draft includes disclosures requirements that, as applied to mass torts, simply do not fit or that will create substantial burdens or prejudice. For example, when a complaint does not seek a specific amount of damages, the Exposure Draft requires the financial statement preparer to provide a “*best estimate* of the maximum exposure to loss.” (Prop. FAS 16X at ¶ 7(a)(2) (*italics added*)). Because most jurisdictions do not permit plaintiffs to seek a specific amount of damages in an initial complaint, defendants frequently will be required to provide these “best estimate[s].” As described above, however, mass torts are characterized by explosive growth, rapid change, a dearth of information about individual plaintiffs, unpredictable procedural and substantive rulings, and wildly divergent verdicts on quite similar facts. Individual mass tort cases, such as the *Ernst* case in the Vioxx litigation, may have “values” ranging from hundreds of millions when an adverse verdict is rendered to zero when that verdict is set aside. The defendant’s “best estimate” of the “exposure to loss” is likely to be unreliable, subject to constant change, and of little or no value to financial statement users.

Moreover, given the huge volumes of litigation our companies face, often many thousands (or tens of thousands) of pending cases, and the fact that the likely outcome of any one of those cases may turn on the array of constantly-changing events described above, merely compiling, reviewing, and assessing information will require tremendous resources. It will be extremely difficult, if not impossible, to keep our litigation-related disclosures current and accurate.

Further, the Exposure Draft requires defendants to estimate and disclose the “*maximum exposure to loss*.” (*Id.* (*italics added*)). It is not clear whether this requires defendants to formulate and disclose the worst conceivable outcome, worst reasonably conceivable outcome, worst likely outcome, or something else. Whatever the precise test, for mass torts involving hundreds or thousands of cases, many of which include claims for punitive damages, preparing this estimate will be a futile effort that will provide no meaningful information to financial statement users. Instead, the primary “users” of these estimates are likely to be plaintiffs’ counsel, who may seek to use them in settlement negotiations, the media, depositions, or trial.

Separately, when “disclosure of certain information about the contingency may be prejudicial to the entity’s position,” the Exposure Draft permits “aggregat[ing] the disclosures required in paragraph 7 at a level higher than by the nature of the contingency such that disclosure of the information is not prejudicial.” (*Id.* at ¶ 11). We share concerns others have expressed that (1) simply aggregating these disclosures will not avoid prejudice, and (2) in supposedly “rare instances” where aggregation will not avoid prejudice, the required disclosures are too extensive. We note additionally, however, that aggregation should be expressly

permitted not only for instances in which disclosures would be “prejudicial,” but also where, as in the mass tort situation, the sheer volume of the litigation requires it.

Further, one of the Board’s specific questions for comment states that “[t]he Board decided not to require” disclosures relating to settlement offers and demands. (Prop. FAS 16X, Question 6). For the reasons detailed at pages 9 and 10 above, we agree. The Exposure Draft, however, requires disclosure of “the anticipated timing of ... resolution” and the entity’s “qualitative assessment of the most likely outcome of the contingency” (*id.* at ¶ 7(b)),⁷ which some might incorrectly suggest call for disclosures relating to settlement offers and demands. We ask that the Board reconfirm its intent to exclude settlement discussions by expressly excluding them from ¶ 7’s disclosure requirements.

Finally, and as others have said in their comments, we believe the Exposure Draft’s new quantitative and qualitative disclosure requirements may permit plaintiffs to learn or reverse-engineer defendants’ litigation assessments and strategies. The newly-required disclosures – the financial statement preparer’s “best estimate of the maximum exposure to loss,” “the anticipated timing of [the action’s] resolution,” the “factors that are likely to affect the ultimate outcome ... along with their potential effect on the outcome,” and the “qualitative assessment of the most likely outcome of the contingency” – will tilt the adversarial balance heavily in favor of plaintiffs, particularly in cases for which there have been accruals. That is simply inappropriate and will work to the disadvantage of our shareholders.

⁷ While the Exposure Draft permits aggregation and, in “rare” instances, omission of some of the qualitative disclosures (Prop. FAS 16X at ¶ 11), neither aggregation nor the “rare” exception may resolve this problem. Indeed, the Exposure Draft requires disclosure of “the anticipated timing of ... resolution” even when the “rare” exception has been invoked. (*Id.*).

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Conclusion

The problems the Exposure Draft's new disclosure requirements would create are not limited to mass torts. Nonetheless, and as detailed above, mass torts vividly illustrate many of the Exposure Draft's shortcomings. We submit that the Board should withdraw the Exposure Draft. If, however, the Board elects to pursue additional loss contingency disclosure requirements, we believe that (1) additional analysis of the effectiveness of current requirements is called for; and (2) the disclosure requirements in the Exposure Draft should be substantially revised.

Very truly yours,

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