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**COMMITTEE ON
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VIA EMAIL TO RULE-COMMENTS@SEC.GOV
Chairman Robert C. Pozen
and Other Committee Members

c/o Nancy M. Morris
Federal Advisory Committee Management Officer
Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-3628

Subject: File Number 265-24

Ladies and Gentlemen:

This letter is submitted on behalf of the Financial Reporting Committee of the Association of the Bar of The City of New York (the "Committee") in response to the Progress Report (the "Progress Report") to the Securities and Exchange Commission (the "SEC") of the Advisory Committee on Improvements to Financial Reporting (the "CIFR"). Our Committee is composed of lawyers with diverse perspectives on financial reporting matters, including members of law firms and counsel at major corporations, financial institutions, public accounting firms and institutional investors. A list of members of the Committee is attached as Annex A to this letter¹.

Our Committee supports the efforts of the CIFR and believes that its activities have focused attention and stimulated discussion on many timely topics that are extremely important to investors and the U.S. capital markets. We submit this letter not only to express our views to the CIFR on certain of its Developed Proposals, Conceptual Approaches and Matters for Future Consideration, but to encourage the SEC to direct its efforts in implementing the proposals.

¹ This letter does not necessarily reflect the individual views of each member of the Committee or of the institutions with which they are affiliated.

For your convenience, we have repeated in bold each CIFR Developed Proposal, Conceptual Approach or Matter for Future Consideration we are addressing.

Developed Proposal No. 2.4 The number of parties that either formally or informally interprets GAAP and the volume of interpretative implementation guidance should continue to be reduced. The SEC should coordinate with the FASB to clarify roles and responsibilities regarding the issuance of interpretive implementation guidance, as follows:

- **The FASB Codification, a draft of which was released for verification on January 16, 2008, should be completed in a timely manner. In order to fully realize the benefits of the FASB's codification efforts, the SEC should ensure that the literature it deems to be authoritative is integrated into the FASB Codification to the extent possible, or separately re-codified, as necessary.**
- **To the extent practical, going forward, there should be a single standards-setter for all authoritative accounting standards and interpretive implementation guidance that are applicable to a particular set of accounting standards, such as GAAP or IFRS. For GAAP, the FASB should continue to serve this function. To that end, the SEC should only issue broadly applicable interpretive implementation guidance in limited situations.**
- **All other sources of interpretive implementation guidance should be considered non-authoritative and should not be required to be given more credence than any other non-authoritative sources that are evaluated using well-reasoned, documented professional judgments made in good faith. (Chapter 2 – developed proposal 2.4).**

Conceptual Approach 2.A: To further reduce interpretive implementation guidance associated with GAAP, we are considering proposing that the SEC further clarify its role vis-à-vis the FASB, as well as its internal roles and responsibilities, to mitigate the risk of its actions unintentionally driving behavior by market participants, as follows:

- **The SEC should clarify that registrant-specific matters are not authoritative forms of interpretive implementation guidance under GAAP and, accordingly, registrants other than the specific registrant in question are not required to take into account such registrant-specific matters.**
- **The SEC staff should refrain from informally communicating broadly applicable interpretive implementation guidance (e.g., staff speeches) that are likely to be perceived as changing the application of GAAP. Rather, such communications should be used to highlight authoritative interpretive implementation guidance that has already been issued.**
- **In instances in which the SEC staff identifies registrant-specific accounting matters that it believes may result in the need for broader interpretive implementation guidance or a clarification of an accounting standard under GAAP, the SEC staff should refer these items to the FASB as part of the Agenda Advisory Group.**

- **When it is necessary for the SEC or its staff to issue broadly applicable interpretive implementation guidance, it should try to provide such guidance: (1) in a clear communication identified as authoritative, (2) so that it can easily and immediately be integrated into a codification of SEC literature (as proposed in section V of this Chapter), and (3) when expected to significantly change the application of GAAP, only after transparent due process and public comment to the extent practicable.**
- **The SEC staff should revisit internal procedures and take further steps necessary to improve the consistency of its views on the application of GAAP.**

Our Committee supports a clarification and simplification of the sources of interpretive accounting guidance. We agree with CIFR's observation that there are currently too many sources of interpretive implementation guidance for GAAP. We also agree that the volume of what constitutes GAAP is too great. This confluence of sources and volume of output creates confusion as to what constitutes authoritative GAAP, which increases the scope for disagreements among well-intentioned issuers, auditors and other participants in the capital formation and periodic reporting processes as they seek to comply with appropriate standards. It also creates the opportunity for ever more nuanced structuring that seeks to achieve a desired financial reporting result.

We share CIFR's view that there should be a single standard-setter for GAAP. We also believe that it is important to reaffirm that there should be a single standard-setter for GAAS. We strongly agree that far too much generally applicable accounting guidance is now provided by uncodified, sometimes ephemeral means with inadequate due process and uncertain normative status—presented by the SEC staff in informal settings, or adopted by semi-official committees, or presented by the SEC staff using *ad hoc* means such as open statements or letters. These may be viewed by practitioners as varying existing interpretive positions on GAAP and thus be accorded quasi-authoritative status. We also support the observation that practitioners have at times accorded registrant-specific accounting outcomes undue deference when evaluating other transactions that have important differences. We welcome the CIFR's attention to the ways in which generally applicable accounting guidance is adopted, organized and published.

We also note that guidance issued by audit industry groups (including the Center for Audit Quality), as well as other industry groups, regardless of whether such guidance purports to constitute interpretive implementation guidance or to be authoritative, further complicates the issue. These various forms of *ad hoc* guidance lack the transparent due process and input from holders of diverse views that is necessary for any guidance to become authoritative GAAP or GAAS. We note in particular the recent confluence of "White Papers" issued on interpretive topics relating to GAAP and GAAS, but do not limit our observation solely to promulgations bearing this label. We suggest that CIFR specifically acknowledge these risks and clarify that the views of any such group are not authoritative and should not be construed as such.

To these ends, we fully endorse the provision of Developed Proposal 2.4 stating that the FASB should continue to serve as the sole standards-setter for all authoritative accounting standards and interpretive implementation guidance relating to GAAP. Similarly, we believe that the PCAOB should continue to serve as the sole standards-setter for all authoritative auditing

standards and interpretive implementation guidance relating to GAAS. Any other source of guidance should be considered non-authoritative. We also endorse Conceptual Approach 2.A.

To further support these conclusions, we make the following additional suggestions and observations:

- Any framework for evaluating the exercise of professional judgment should explicitly recognize that reliance upon authoritative guidance promulgated by the FASB or the PCAOB, as the case may be, will be accorded greater deference than reliance on non-authoritative guidance, and that the deference, if any, accorded to non-authoritative guidance will be determined based upon relevant factors, including the extent to which transparent due process was undertaken as part of the development of such guidance (Developed Proposal 3.4).
- We suggest that the FASB's mission statement also acknowledge that FASB should act as the sole authoritative standard setter for GAAP (Developed Proposal 2.2), and that the PCAOB should adopt a similar mission statement as to GAAS.
- We suggest that Developed Proposal 2.3 include in its responsibilities the ability to delegate tasks to other bodies consistent with the FASB's obligation to serve as the sole standard setter for GAAP. In discharging this responsibility, FASB should discourage interpretive implementation guidance to be issued during the initial period after adoption of a new standard by an entity other than the FASB; any such guidance from any other source should expressly be stated to be non-authoritative.
- Similarly, periodic assessments of existing standards should be performed solely by the FASB such that any interpretive guidance resulting from such an assessment should constitute authoritative GAAP.
- We suggest similar roles for the PCAOB in respect of GAAS. We also recommend that Conceptual Approach 2.B. explicitly recommend that the PCAOB adopt a specific mandate that its audit and compliance staff monitor compliance by registered auditing firms with the requirement to not accord undue credence to non-authoritative interpretations of GAAP or GAAS.
- We agree that the SEC should re-codify its guidance so that it is consistent with the final FASB codification, and that the SEC and the FASB should subsequently review SEC accounting statements (including SABs) to determine which, if any, should be deemed to constitute authoritative standards.
- We generally support Conceptual Approach 2.C. We note, however, that we do not agree with the views of certain participants in the U.S. financial reporting community, noted by CIFR, that full-scale adoption of IFRS is the most expeditious means by which to achieve goals set forth in that item. As noted in our comment letter to the SEC on its concept release on permitting U.S. issuers to prepare their financial statements in accordance with IFRS,² we believe that U.S. issuers should be permitted, but not required, to report under

² Comment letter, dated November 16, 2007, of the Committee on Financial Reporting of the New York City Bar on SEC Release No. 33-8831; available at <http://www.sec.gov/comments/s7-20-07/s72007-84.pdf>.

IFRS at this time, in order to provide all parties time to prepare for and implement any such form of convergence.

Developed Proposal No. 7 The FASB or the SEC, as appropriate, should issue guidance reinforcing the following concepts:

- Those who evaluate the materiality of an error should make the decision based upon the perspective of a reasonable investor.
- Materiality should be judged based on how an error affects the total mix of information available to a reasonable investor.
- Just as qualitative factors may lead to a conclusion that a quantitatively small error is material, qualitative factors also may lead to a conclusion that a quantitatively large error is not material. The evaluation of errors should be on a “sliding scale.”

The FASB or the SEC, as appropriate, should also conduct both education sessions internally and outreach efforts to financial statement preparers and auditors to raise awareness of these issues and to promote more consistent application of the concept of materiality. (Chapter 3 – developed proposal 3.1)

Developed Proposal No. 8 The FASB or the SEC, as appropriate, should issue guidance on how to correct an error consistent with the principles outlined below:

- Prior period financial statements should only be restated for errors that are material to those prior periods.
- The determination of how to correct a material error should be based on the needs of current investors. For example, a material error that has no relevance to a current investor’s assessment of the annual financial statements would not require restatement of the annual financial statements in which the error occurred, but would need to be disclosed in an appropriate document, and, to the extent that the error remains uncorrected in the current period, corrected in the current period.
- There may be no need for the filing of amendments to previously filed annual or interim reports to reflect restated financial statements, if the next annual or interim period report is being filed in the near future and that report will contain all of the relevant information.
- Restatements of interim periods do not necessarily need to result in a restatement of an annual period.
- All errors, other than clearly insignificant errors, should be corrected no later than in the financial statements of the period in which the error is discovered. All material errors should be disclosed when they are corrected.

- **The current disclosure during the period in which the restatement is being prepared, about the need for a restatement and about the restatement itself, is not consistently adequate for the needs of investors and should be enhanced. (Chapter 3 – developed proposal 3.2)**

Developed Proposal No. 9 The FASB or the SEC, as appropriate, should develop and issue guidance on applying materiality to errors identified in prior interim periods and how to correct these errors. This guidance should reflect the following principles:

- **Materiality in interim period financial statements must be assessed based on the perspective of the reasonable investor**
- **When there is a material error in an interim period, the guidance on how to correct that error should be consistent with the principles outlined in developed proposal 8 above. (Chapter 3 – developed proposal 3.3)**

Our Committee very much supports the CIFR proposal that FASB or the SEC issue guidance on materiality in the context of restatements. At present, the analysis of materiality in this context is extremely confused, inconsistent, unduly influenced by anticipated regulatory reaction, and lacking in sufficient framework for a proper materiality analysis.

We agree that the evaluation of materiality should be based upon judicial determinations that a fact is material if there is a substantial likelihood that a reasonable investor in making an investment decision would consider it as having significantly altered the total mix of information available. *Basic, Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). Of particular importance is the fact that a “reasonable investor” would (all other things being equal) likely view older information as less material than more recent information. The mere fact that an error was material at the time it was made, therefore, does not mean that it should continue to be viewed as material at a subsequent date. That is particularly so where the “total mix” of available information has improved to a level that eliminates the significance of a prior error.

We would encourage a proposal that would impose an overlay on SAB 99 for the purpose of evaluating materiality in the context of a potential restatement. SAB 99 is in many respects an excellent standard, but it alone should not govern the necessity for a restatement. To effectively apply materiality concepts in the context of restatements, auditors and reporting issuers would benefit from additional guidance with respect to the effect of the passage of time on materiality assessments and a restatement’s intended audience of investors.

Furthermore, the necessity for a restatement should be focused on the reasonable investor. All too often, a rigid application of SAB 99’s qualitative criteria – particularly the criterion of intent – yields the determination that even utterly inconsequential errors should result in a restatement of financial statements even if investors would not care about the numerical difference.

Our Committee believes that the SEC should propose rules governing how registrants should report restatements and the correction of errors under the Securities Exchange Act of

1934 (the "Exchange Act"). There is currently no applicable rule, and there is a great deal of confusion among reporting companies and their advisors concerning how to report restatements and particularly whether to amend previously filed reports. The uncertainty appears to extend to the SEC staff, which has taken conflicting positions from time to time.

The subject could readily be addressed in a rule, which should generally be guided by the principles listed in the CIFR proposals. Our committee particularly agrees that: (a) reporting should address the needs of current investors, (b) amending previously filed reports is unnecessary if a more recent (or shortly forthcoming) report provides the information useful to current investors and (c) material errors should be corrected and the correction should be disclosed.

We also suggest that the CIFR ask the SEC to revisit Item 4.02 of Form 8-K, to clarify the circumstances and timing of disclosure concerning a pending restatement. The use of "non-reliance" terminology has proved in practice to be confusing because it requires a different analysis from that made in connection with the restatement itself. For example, it is common for a registrant to conclude that it must make a restatement, but not to conclude that investors must not rely on the financial statements previously issued. While such an issuer could reasonably conclude that no Form 8-K is required, it is widely presumed that every restatement requires a Form 8-K, and the SEC staff sometimes appears to apply such a presumption. The SEC should either amend the form to state that it is triggered by any restatement, or provide guidance to the effect that not all restatements require an Item 4.02 Form 8-K report.

We believe the SEC should also clarify the subject of an issuer's reporting during the period in which a restatement is being prepared. We believe that this is an issue that depends upon the unique facts and circumstances surrounding each situation requiring the restatement. The SEC should provide guidance to issuers to the effect that federal securities laws do not prohibit the issuer from disclosing during this period material information, including operating data and other financial information that is not affected by the issues that are requiring the restatement.

Developed Proposal No. 10 The SEC should adopt a judgment framework for accounting judgments. The PCAOB should also adopt a similar framework with respect to auditing judgments. Careful consideration should be given in implementing any framework to ensure that the framework does not limit the ability of auditors and regulators to ask appropriate questions regarding judgments and take actions to require correction of unreasonable judgments.

The proposed framework applicable to accounting-related judgments would include the choice and application of accounting principles, as well as the estimates and evaluation of evidence related to the application of an accounting principle. We believe that a framework that is consistent with the principles outlined in this developed proposal to cover judgments made by auditors based on the application of PCAOB auditing standards would be very important and would be beneficial to investors, preparers, and auditors. Therefore, we propose that the PCAOB develop a professional judgment framework for the application and evaluations of judgments made based on PCAOB auditing standards. (Chapter 3 – developed proposal 3.4)

Our Committee recognizes that this proposal has been met with some controversy. Some observers have noted that the exercise of judgment always has played an essential role in the choice and application of accounting principles and that some or many of the elements of the suggested framework exist elsewhere in the accounting and auditing literature. Consequently, it has been suggested that the framework would add little useful guidance, and could have the unintended effect of creating a *de facto* "safe harbor" for an accountant or auditor who utilizes the framework yet arrives at improper accounting. The most frequently stated concern, however, is that a judgment framework sanctioned in accounting and audit guidance would limit the leverage of an auditor to challenge incorrect application of accounting principles by preparers of financial statements.

Our Committee acknowledges these concerns but submits that countervailing considerations support the efforts of the CIFR in this area. With the ongoing move toward principles-based accounting standards, the careful and considered exercise of judgment will become ever more important. (Indeed, a judgment framework could facilitate practitioners' acceptance of principles-based accounting.) As the Progress Report notes, "professional judgments could differ between knowledgeable, experienced, and objective persons". While our Committee is not the best suited to evaluate the particular elements of the proposed framework, we believe that an appropriate process for analysis of the facts, review and consideration of accounting guidance, consideration of the application of alternative accounting treatments and any diversity in practice, and assessment of the rationale supporting the accounting treatment cannot but help accountants and auditors more consistently reach appropriate judgments.

It does not diminish the value of the framework, however, to recognize that countering the risk that auditors may lose influence over preparers' application of accounting principles must be a central emphasis of the drafters (SEC/FASB, PCAOB) of eventual guidance in this area. The framework should not become a "check the box" endeavor, and documentation of the steps followed in reaching a decision cannot be permitted to eclipse the thoughtful exercise of professional judgment; more rigor is required of the guidance to avoid these hazards. We also have considered the possibility that a judgment framework for accountants might call for a more restrictive range of judgment for preparers of financial statements, in contrast to the framework that would be followed by auditors, thus helping to insure that the leverage traditionally exercised by auditors to challenge inappropriate accounting is preserved.

In summary, our Committee feels that the development of properly calibrated guidance in this area is worthy of further consideration, but that a more detailed proposed framework is needed to consider its eventual value in providing more reliable and consistent financial reporting.

Developed Proposal No. 11 The SEC should, over the long-term, mandate the filing of XBRL-tagged financial statements after the satisfaction of certain preconditions relating to: (1) successful XBRL U.S. GAAP Taxonomy testing, (2) capacity of reporting companies to file XBRL-tagged financial statements using the new XBRL U.S. GAAP Taxonomy on the SEC's EDGAR system, and (3) the ability of the EDGAR system to provide an accurately rendered version of all such tagged information. The SEC should phase-in XBRL-tagged financial statements as follows:

- **The largest 500 domestic public reporting companies based on unaffiliated market capitalization (public float) should be required to furnish to the SEC, as is the case in the voluntary program today, a document prepared separately from the reporting companies' financial statements that are filed as part of their periodic Exchange Act reports. This document would contain the following:**
 - **XBRL-tagged face of the financial statements**
 - **Block-tagged footnotes to the financial statements.**
- **Domestic large accelerated filers (as defined in SEC rules, which would include the initial 500 domestic public reporting companies) should be added to the category of companies, beginning one year after the start of the first phase, required to furnish XBRL-tagged financial statements to the SEC.**
- **Once the preconditions noted above have been satisfied and the second phase-in period has been implemented, the SEC should evaluate whether and when to move from furnishing to the SEC to the official filing of XBRL-tagged financial statements with the SEC for the domestic large accelerated filers, as well as the inclusion of all other reporting companies, as part of a company's Exchange Act periodic reports. (Chapter 4 – developed proposal 4.1)**

Our Committee supports the development of XBRL and encourages its phase-in on a “furnished” basis. Before the filing of XBRL financial statements becomes mandatory for any class of registrant, we believe that questions concerning liability for those financial statements under Section 11 of the Securities Act of 1933 (the “Securities Act”) must be resolved. These questions will have significant implications for the securities underwriting process and the liability of officers and directors of the registrant and of underwriters. In particular, if XBRL tagging is not the subject of an expert opinion for purposes of Section 11, officers, directors and underwriters may have higher risks of liability on the XBRL version of audited financial statements than they do today on the traditional version of the audited financial statements. The resulting uncertainty about the due diligence process would be contrary to the interests of issuers and investors as well as underwriters. There may be other issues that arise with respect to XBRL reporting as issuers phase in, including difficulties as U.S. issuers begin to report financial information under IFRS. Our Committee believes mandatory filing of XBRL financial statements should only occur after sufficient time has passed in the observational stage to understand and address all relevant issues.

If there are independence issues with an issuer's public accounting firm providing advice to its client on XBRL tagging, we suggest that those be resolved through a change in the independence rules rather than by requiring issuers to retain another accounting firm or other expert to provide this assistance.

Developed Proposal No. 12. The SEC should issue a new comprehensive interpretive release regarding the use of corporate websites for disclosures of corporate information, which addresses issues such as liability for information presented in a summary format, treatment of hyperlinked information from within or outside a company's website,

treatment of non-GAAP disclosures and GAAP reconciliations, and clarification of the public availability of information disclosed on a reporting company's website.

Industry participants should coordinate among themselves to develop uniform best practices on uses of corporate websites for delivering corporate information to investors and the market. (Chapter 4 – developed proposal 4.2)

Our Committee believes that the SEC has provided adequate guidance on this subject and that the CIFR need not address this subject. There are some difficult questions surrounding corporate websites, but none of them represents a pressing policy priority, compared to the other matters the CIFR is considering. Moreover, practices are still emerging, and our Committee believes that the subject is not ripe for the SEC to give it comprehensive attention.

Matters for Future Consideration:

- **Use of executive summaries as an integral part of Exchange Act periodic reports.**
- **Disclosures of key performance indicators (KPIs) and other metrics to enhance business reporting.**
- **Improved quarterly press release disclosures and timing (including an evaluation of the advisability of requiring the issuance of the earnings release on the same day that the periodic report is filed).**
- **Continued need for improvements in the management discussion and analysis (MD&A) and other public company financial disclosures (including an evaluation of the advisability of the SEC periodically issuing a report on common types of comments issued on the MD&A and other financial disclosures, similar to the Fortune 500 report, to provide additional guidance on improving the MD&A in accordance with the SEC's most recent interpretive guidance). (page 82)**

Our Committee believes that if an executive summary is required, then other mandated financial disclosures should be trimmed back to avoid redundancy and prevent disclosure documents from becoming even longer. Exchange Act reports contain considerable redundancy between the MD&A and the financial statement footnotes. We do not believe that an added layer of disclosure would benefit investors.

We believe that mandatory disclosure of key performance indicators (“KPIs”) should be considered by the SEC only following careful consideration of a number of sensitive issues that would arise, including liability and potential competitive harm. While we fully support the underlying goal of MD&A to provide information about the company viewed through the eyes of management, the SEC's existing disclosure rules and guidance already permit the use of KPIs that are material to a registrant's results of operations and financial condition (and, to the extent the registrant elects to or is required to include forward-looking disclosures, its prospects). We believe that there is little question that the SEC and its staff has long encouraged registrants to utilize company-specific metrics to facilitate investors' ability to understand the registrant's business and financial results. The SEC has carefully addressed the interrelated subjects of projections, forward looking information and non-GAAP financial measures. Our Committee

