Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

650 Page Mill Road
Palo Alto, CA 94304-1050
PHONE 650.493.9300
FAX 650.493.6811
www.wsgr.com

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VIA ELECTRONIC MAIL

Technical Director – File Reference No. 1840-100
Financial Accounting Standards Board
of the Financial Accounting Foundation
401 Merritt 7
P.O. Box 5116
Norwalk, CT 06856-5116
director@fasb.org

Re: Comments on Exposure Draft on Proposed Accounting Standards Update, *Contingencies (Topic 450), Disclosure of Certain Loss Contingencies*

To Whom It May Concern:

On behalf of our clients (each a "**Company**" and collectively the "**Companies**") listed on Exhibit A hereto, all of whom are co-signatories to this letter, Wilson Sonsini Goodrich & Rosati appreciates the opportunity to respond to the Exposure Draft on the Proposed Accounting Standards Update, *Contingencies (Topic 450), Disclosure of Certain Loss Contingencies* (the "**Exposure Draft**").

The Companies commend the Board for attempting to address some of the concerns commentators had with the previous exposure draft on this topic in 2008, File Reference No. 1600-100 (the "**2008 Exposure Draft**"). The Companies recognize that the objective of the Exposure Draft is to improve the overall quality of disclosures about loss contingencies. The proposed amendments relating to contingencies arising from pending or threatened legal claims, however, continue to raise a number of concerns, including some concerns the Companies had with the 2008 Exposure Draft. In general, the Companies submit that compliance with the proposed qualitative and quantitative disclosure requirements will likely prejudice their ability to conduct and resolve litigation and entail substantial monetary and other costs that significantly outweigh the potential benefits, as outlined below. Accordingly, the Companies believe that the Board should retain the existing standards under Topic 450, which generally work well and are better suited to the U.S. litigation system.

1. The required qualitative and quantitative disclosures in the Exposure Draft, while an improvement on the proposals in the 2008 Exposure Draft, are not operational because they would likely force the Companies to reveal privileged information, including

confidential or competitively sensitive aspects of their strategies for dealing with pending or threatened claims.

While the Exposure Draft states that it seeks only "publicly available quantitative information [and] relevant non-privileged information," in fact the Exposure Draft may still result in the disclosure of confidential and privileged information, as well as information that may be confusing and not useful, or even misleading, for investors.

For example, disclosure of loss estimates and accruals could lead to disclosure (and therefore potential waiver) of attorney-client or work-product privileged information, since such estimates and accruals are typically based in part on advice of counsel. Further, since auditors will be required to test qualitative analyses and loss estimates as part of their audit work, there may be increased pressure for them to seek privileged information from a Company in order to perform this testing, which also could further erode protection under the attorney-client privilege and work-product privilege.

Disclosure of all accruals, which under existing standards are required to be disclosed only "in some circumstances" where it "may be necessary for the financial statements not to be misleading," is likely to negatively impact a Company's settlement position, which could lead to higher settlement payments and ultimately harm shareholders' interests. Adverse parties would learn the amount of loss that the Company believes is "probable" and "reasonably estimable," essentially establishing a floor for settlement negotiations. Tabular disclosure of changes in litigation accruals could be traceable to particular litigation or other contingencies, providing a Company's litigation opponents with a period-by-period window into the Company's judgments on its loss accruals and prejudicing the Company's position in the litigation. Also of concern is that the required disclosures may themselves be admissible in evidence against a Company in the proceeding that is the very subject of the disclosure (i.e., an admission against self interest).

In addition, disclosure of expert witness testimony regarding damages, merely because it is "publicly available" (a term the Exposure Draft fails to define), may not be useful to investors and could even be misleading. Damage claims are often intensely contested, and litigation opponents frequently offer expert testimony on damages that can differ materially. Such testimony can last for several hours—even days or weeks—and is not easily summarized into concise, balanced, easily understood financial statement disclosure. The exposure draft appears to require disclosure of an opponent's expert witness testimony so long as it is public, forcing the Companies to disclose such information even if they believe that the testimony is unsubstantiated or misleading. In addition, assuming that an opponent's experts have testified or otherwise made their opinions public and a Company's experts have not, the Company might be compelled to disclose its litigation strategy and preview its expert testimony in its public disclosure, giving its litigation opponents an advantage in court.

Similar prejudicial concerns exist with the proposed requirements to disclose the amount of a claim and the basis for defense of the claim. In situations where the amount claimed is excessive and bears no relation to reality, disclosure of the claimed amount would be unbalanced and misleading without mitigating disclosure. Such mitigating disclosure, however, could force a Company to determine whether to disclose its defense strategy or attorney-client privileged or work product privileged information, either in the public filings where the amount claimed was reported or in evidentiary support to auditors verifying the disclosure. Disclosure regarding the basis of a Company's defense of a claim could similarly force decisions about premature public articulation of defense strategies, thus prejudicing the Company and potentially harming its shareholders. The new disclosure requirements accordingly may, in some circumstances, force a Company to decide whether to include unbalanced and potentially misleading disclosure in a report, the accuracy of which its executive officers must certify,[1] or to disclose mitigating information that could prejudice it in litigation. Neither result is satisfactory.

Similarly, disclosure of discoverable information regarding insurance and other recoveries could result in disclosure of confidential information and would disadvantage a Company in future litigation. Such information is typically discoverable, and thus would almost always be disclosed. Disclosure of a Company's insurance coverage limits would therefore make public information that today is typically kept confidential outside of the discovery context, and even in the discovery context is often kept confidential between the litigation parties, and would give future litigation opponents a window into the Company's insurance coverage.

Finally, disclosure of "non-privileged" information about the proceeding is also problematic. First, the term "non-privileged" is not defined in the Exposure Draft, potentially leading to confusion and uncertainty in its application. Second, information that is not privileged may still be highly confidential. For example, all information exchanged by litigation opponents in discovery is non-privileged, but discovery often remains confidential and not available to the public. Requiring a Company to review all discovery produced in litigation for information that is "relevant to financial statement users" on the amount of loss could well be an expensive and time-consuming exercise that in the end may result in no benefit to investors.

In short, the Companies believe that the disclosure requirements of the Exposure Draft are not operational in that they are likely to lead to disclosure of privileged information, including regarding the Companies' litigation strategies, which ultimately would harm the Companies' shareholders more than benefitting them. For the reasons expressed above, such disclosure requirements are also likely to further shift the balance of power to litigious plaintiffs

[1] In this regard, we remind the Board that the principal executive and principal financial officers of the Companies are required by rules implemented as a result of the Sarbanes-Oxley Act of 2002 to include a certification with a quarterly or annual report that, among other things, the report "does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading."

and their counsel, who could use the detailed public disclosure requirements to their advantage in litigation as well as settlement discussions.

2. Complying with the required qualitative and quantitative disclosures under the Exposure Draft will be costly, time consuming, and subject to substantial risk of error.

Because the disclosures required by the Exposure Draft are specific and granular, compliance with such disclosures will be extremely burdensome. This burden will particularly affect those Companies that are involved in large, complex litigation, such as class action lawsuits, consumer complaints, antitrust litigation, intellectual property disputes, and regulatory matters, which often involve unasserted claims. The substantial attorney time required to analyze these matters and provide qualitative disclosures and loss estimates means that the Companies will incur greater legal fees for responding to the auditors' requests for information. The Companies will have to spend considerably more time evaluating, and reevaluating, often regardless of the merits of a particular matter, each of their respective litigation matters and third-party disputes and the related loss exposures in connection with each periodic filing. This will be particularly burdensome and costly for matters in early stages of litigation where discovery has not yet started. In the case of large, complex litigation, such as class action lawsuits, the risk of exposure will likely need to be assessed by commissioning expensive and time-consuming damages reports. In addition, it will be difficult, costly, and time-consuming for auditors to audit the resulting quantitative disclosures and loss estimates.

As the Board is aware, disclosure requirements for U.S. public companies have increased in recent years and are expected to increase further. Without even discussing changing accounting standards or initiatives, of which the Board is obviously aware, recent changes in Securities and Exchange Commission ("**Commission**") regulations have required increased annual reporting and proxy disclosure, and further changes, such as those required by the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act, are imminent. These rules have made and will make the Companies' annual reporting and annual meeting processes more burdensome and expensive, making the burden and expense of new disclosures required by the Exposure Draft even more difficult.

3. The requirement to provide information about asserted remote contingencies is likely to result in immaterial disclosures that would not be helpful information for investors, and indeed could prove to be misleading.

The Exposure Draft requires the disclosure and discussion of asserted remote contingencies if, due to their nature, potential magnitude, or potential timing (if known), the remote loss contingency could have a "severe impact," meaning a significant, financially disruptive effect in the near term (i.e., within one year). While the Exposure Draft limits disclosure of remote loss contingencies to asserted claims, an improvement on the 2008 Exposure Draft, the treatment of remote loss contingencies under the Exposure Draft remains problematic. The Companies submit that this requirement would place legal counsel and financial advisors in the impossible position of having to accurately assess and opine on something – a remote event – that is inherently uncertain and unknowable. This, in turn, is likely to result in disclosures about pending litigation that are more misleading than informative, which could cause serious prejudice to the disclosing Company and could potentially harm its shareholders. In addition, the absence of a likelihood threshold may create additional problems for the Companies by providing unfair leverage to claimants who assert unfounded, overstated or frivolous claims as it gives such cases far greater prominence than is warranted. Further, the Companies believe that the requirement to disclose remote loss contingencies may make the settlement of these often questionable or dubious cases less likely. The Companies submit that the existing materiality standard (*i.e.*, a fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important) should continue to govern asserted remote loss contingencies.

4. The disclosure required by the Exposure Draft could itself lead to an increased risk of litigation.

Since litigation assessments are inherently uncertain, the disclosures required by the Exposure Draft may themselves become a source of securities litigation. Assessments of pending and threatened claims are inevitably forward looking, uncertain, and subject to factors outside the control of any of the parties. As a result, the required disclosures and estimates may be sources of additional claims and litigation in the event that they prove to be inaccurate, particularly claims of fraud. This concern is exacerbated by the fact that the safe harbor protection for forward-looking statements contained in the federal securities laws does not apply to statements made in financial statement disclosures.

5. The Exposure Draft's prohibition on considering insurance and indemnification when assessing the materiality of loss contingencies to determine whether disclosure is required may lead to unhelpful and potentially misleading disclosure.

Under the Exposure Draft, companies that are assessing the materiality of a loss contingency to determine whether disclosure is required may not consider the possibility of recoveries from insurance or other indemnification arrangements. These mechanisms, however, are primary ways in which Companies attempt to mitigate risks from loss contingencies, and consideration of such mechanisms is integral to a Company's ability to determine whether disclosure regarding a loss contingency would be material to an investor's complete understanding of the Company's financial statements. The inability to consider insurance and indemnification recoveries makes it even more complex for Companies to determine whether to disclose asserted, remote contingencies, as discussed above, particularly since the standard for disclosure of such loss contingencies is whether it would cause a "potential severe impact."

6. The disclosure required by the Exposure Draft is inconsistent with current Commission disclosure obligations.

The Exposure Draft could also conflict with the Commission's litigation disclosure standards contained in Item 103 of Regulation S-K. Item 103 requires a brief description of "any material pending legal proceedings, other than ordinary routine litigation incidental to the business," but does not require disclosure of "any proceeding that involves primarily a claim for damages if the amount involved, exclusive of interest and costs, does not exceed 10 percent of the current assets" of the company. The Exposure Draft does not address Item 103.

* * * * *

In conclusion, the Companies submit that the Exposure Draft is not likely to result in meaningful improvements in the reporting of qualitative or quantitative information about loss contingencies or otherwise meet the Exposure Draft's goals, and does not justify the substantial incremental costs and efforts that would be entailed in compliance. Accordingly, for the reasons stated above, the Companies do not believe that the proposed disclosures will enhance and improve the information provided to financial statement users about the nature, potential magnitude, and potential timing (if known) of loss contingencies.

The Companies believe that the existing standards under Topic 450 work well. Based on their past experience, the Companies believe that investors and other users of financial statements understand current disclosure practices as they relate to pending or threatened litigation and understand that detailed descriptions and loss estimates about such matters would be imprecise and potentially incorrect. The current standards have the advantages of ease of application, cost effectiveness, protecting the legal rights and strategies of the disclosing Company, and auditability. The Companies submit that the new standards in the Exposure Draft fall short under each of these measures and are generally inconsistent with the goal of providing reliable and consistent financial statements.

The Companies also believe that the proposed effective date (fiscal years ending after December 15, 2010) of the Exposure Draft, should it be adopted, is not operational and should be extended at least one year from adoption to allow time for the Companies' shareholders to be educated about the substantial new disclosure standards.

We would be pleased to discuss our comments and to answer any questions that the FASB may have. Please do not hesitate to contact Mark Bertelsen, Keith Eggleton or Richard Blake at 650-493-9300 regarding our submission.

Sincerely,

Wilson Sonsini Goodrich & Rosati
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

EXHIBIT A

Co-Signatories

ADVENT SOFTWARE, INC. Randall Cook, Vice President and General Counsel
APPLIED MATERIALS, INC. Joseph J. Sweeney, Senior Vice President, General Counsel and Corporate Secretary
AUTODESK, INC. Pascal W. Di Fronzo, Senior Vice President, General Counsel & Secretary
CYPRESS SEMICONDUCTOR CORPORATION Brad W. Buss, Executive Vice President, Finance and Administration and Chief Financial Officer Victoria Tidwell, Vice President, Legal Affairs and General Counsel
EXPEDIA INC. Burke Norton, Executive Vice President and General Counsel
INFORMATICA CORPORATION Peter McGoff, Senior Vice President and General Counsel Earl Fry, Chief Financial Officer
MICRON TECHNOLOGY, INC. Roderic W. Lewis, Vice President of Legal Affairs, General Counsel and Corporate Secretary
NETFLIX, INC. Reg Thompson, Senior Corporate Counsel
PLANTRONICS, INC. Richard R. Pickard, Vice President-Legal and General Counsel
TIVO INC. Matthew P. Zinn, Senior Vice President & General Counsel