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Via E-mail to rule-comments@sec.gov

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Attn: Elizabeth M. Murphy, Secretary

Re: File No. SR-NASDAQ-2013-032
Release No. 34-69030
Notice of Filing of Proposed Rule Change to Require that Listed Companies Have an Internal Audit Function

Ladies and Gentlemen:

Wilson Sonsini Goodrich & Rosati ("WSGR") appreciates the opportunity to submit this letter in response to the solicitation of comments by the Securities and Exchange Commission ("SEC") with respect to the above-referenced release.

We are a legal advisor to technology, life sciences, and other growth enterprises worldwide, and represent companies at every stage of development, from entrepreneurial start-ups to multibillion-dollar global corporations. Among our clients are over 300 public companies, to whom we provide advice on a wide range of areas, including antitrust, corporate finance, corporate governance, intellectual property, securities litigation and employee benefits and compensation matters. Among our public company clients are a number of small public companies and recent public companies that qualify as Emerging Growth Companies, as such term is defined in the Jumpstart our Business Startups Act of 2012 (the "JOBS Act"). We also represent a significant number of private companies that are contemplating listing on an exchange in the next 12 to 24 months.

On March 4, 2013, the SEC published a request for comment regarding the NASDAQ Stock Market LLC's ("NASDAQ's") proposed adoption of Rule 5465 that would require all listed companies to establish and maintain an internal audit function (the "Proposed Rule"), consistent with New York Stock Exchange Rule 303A.07(c). Pursuant to the Proposed Rule, companies listed on NASDAQ's exchanges would be permitted to outsource their internal audit

function to a third party, and such function would report directly to the listed company's audit committee.

We believe that the Proposed Rule imposes an unnecessary burden on listed, non-accelerated filers and Emerging Growth Companies without providing a commensurate benefit. The Proposed Rule, while providing issuers with the flexibility to outsource the internal audit function, would merely add burdens of expense and management that many small public companies and Emerging Growth Companies can ill afford and for which they have not budgeted. Accordingly, we believe that the Proposed Rule should be revised to include an exemption for non-accelerated filers and to phase in the requirements for Emerging Growth Companies, as detailed further below.

Currently, NASDAQ Rule 5605(3) provides that issuers must have an independent audit committee with the powers set forth in Rules 10A-3(b)(2), (3), (4) and (5) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), which require, among other things, that issuers adopt an audit committee charter that provides the committee with investigative authority, as well as the right to retain advisors at the issuer's expense. These rules enable audit committees to establish an internal audit function should they deem it appropriate and in the best interests of their stockholders. However, such provisions do not mandate the creation of an internal audit function. Had Congress and the SEC believed that such a mandate was necessary, it was within their power to establish requirements for internal audit functions in the Sarbanes – Oxley Act of 2002 ("SOX"), the Dodd Frank Wall Street Reform and Consumer Protection Act of 2010 or, with respect to the SEC, by rulemaking. Section 404 of SOX requires issuers whose shares are registered on a securities exchange (i) to conduct annual evaluations of their internal control over financial reporting, (ii) to report on their internal control and (iii) other than with respect to Emerging Growth Companies and non-accelerated filers, to obtain annual evaluations of such internal control over financial reporting by their independent auditors.

Small market capitalization and newly public companies are often issuers that have only recently become profitable. For many of these issuers, a cent of earnings per share is affected by as little as $100,000 of expenses. Implementing requirements that all issuers must have an internal audit function would adversely impact these issuers' ability to achieve and maintain profitability. Audit committees, which already have the authority to implement a standing internal audit function or use independent advisors as needed, should be given the discretion to determine whether the cost of an internal audit function, whether staffed internally or outsourced, is necessary and appropriate for a given issuer in light of its status as a small or newly public company. These issuers and their audit committees are already focused on risk mitigation and

the effectiveness of their internal control over financial reporting, and the requirements set forth in Item 308(b) of Regulation S-K provide investors with visibility with respect to these efforts.

The implementation of the Proposed Rule would also be inconsistent with the approach taken by Congress in passing the JOBS Act, which provides a holiday from the auditor attestation requirements of Item 308(b) of Regulation S-K. Although the JOBS Act requires newly public issuers to attest to their management's assessments of internal control over financial reporting, it recognized the expense of making those assessments, as well as the burden imposed on internal personnel. In their review of internal control over financial reporting, audit committees have the discretion to request additional areas of emphasis and to evaluate the relative risks of different types of controls. This process provides audit committee members with information about the risks that an issuer faces, and they have discretion to allocate an issuer's resources to address risks that are identified and that may or may not have been remediated by the time of the year end assessment.

In the course of their annual audits, independent auditors are required to meet with issuers to review areas of emphasis and to provide an assessment of the significance of various judgments, the degree of subjectivity, the degree of complexity and management's degree of conservatism. While audit committees cannot rely on independent auditors to perform the functions that an internal auditor would perform, the information about the significance of various judgments provides members of the audit committee with a basis on which to allocate resources to best serve stockholders. Imposing a requirement to have an internal audit function would limit that discretion and force resources to be allocated to that function, rather than to information technology system upgrades or other actions that directly affect internal control over financial reporting. This disproportionately affects smaller public companies and Emerging Growth Companies, who typically have more limited resources.

For these reasons, we believe that the Proposed Rule should be amended consistent with Item 308 of Relation S-K to include a phase-in compliance period for Emerging Growth Companies and an exemption for non-accelerated filers. We propose that a listed issuer should not be subject to the requirements of the Proposed Rule until the end of the first fiscal year that commences after the issuer no longer qualifies as an Emerging Growth Company under the JOBS Act. Further, we propose that a listed issuer should not be subject to the requirements of the Proposed Rule if it does not qualify as a "large accelerated filer" or an "accelerated filer" as those terms are defined in Rule 12b-2 of the Exchange Act.

Thank you for considering our view on this subject. We would be pleased to discuss our comments and our experience with you, and answer any questions you may have. Please do not hesitate to contact Steven E. Bochner, Jon C. Avina or me at (650) 493-9300.

Sincerely,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

Julia Reigel