

Statistics, and the Occupational Safety and Health Administration); Environmental Protection Agency; Department of Transportation; Office of Advocacy of the Small Business Administration; Internal Revenue Service; Department of Health and Human Services (including the Centers for Medicare and Medicaid Services); Department of Agriculture; Department of the Interior; the General Services Administration; and two other participants to be selected by the Director of OMB (who are the Department of Commerce and additional representatives from the Small Business Administration).

The Small Business Paperwork Relief Task Force solicited public comments on the Draft Report from May 9, 2003 to June 4, 2003. All comments received by OMB were considered and resulted in modifications to the final report. A summary of the public comments with responses of the Task Force is attached in Appendix 8 of the Final Report.

Donald R. Arbuckle,

Administrator, Office of Information and Regulatory Affairs.

Mark Forman,

Administrator, Office of E-Government and Information Technology.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48075; File No. PCAOB-2003-02]

Public Company Accounting Oversight Board; Notice of Filing of Proposed Rule on Funding

June 23, 2003.

Pursuant to section 107(b) of the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act" or "Act"), notice is hereby given that on April 16, 2003, the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "Commission") the proposed rules as described in Items I, II, and III below, which items have been prepared by the Board. The Commission is publishing this notice to solicit comments on the proposed rules from interested persons.

I. Board's Statement of the Terms of Substance of the Proposed Rule

On April 16, 2003, the Board adopted five proposed rules relating to public company funding of the Board's operations (PCAOB Rules 7100 through 7104), plus certain definitions that

would appear in PCAOB Rule 1001, to implement section 109 of the Act. Section 109 provides that funds to cover the Board's annual budget (less registration and annual fees paid by public accounting firms) are to be collected from public companies (*i.e.*, "issuers," as defined in the Sarbanes-Oxley Act). The amount due from such companies is referred to in the Sarbanes-Oxley Act as the Board's "accounting support fee." The five proposed rules provide for equitable allocation, assessment and collection of the Board's accounting support fee.

II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, its proposed rules on funding and discussed comments it received on them. The text of these statements may be examined at the places specified in Item IV below. The Board has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule

(a) Purpose

The Act established the Board as a nonprofit corporation, subject to and with all the powers conferred upon a nonprofit corporation by the District of Columbia Nonprofit Corporation Act, to oversee the audits of public companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports for companies the securities of which are sold to, and held by and for, public investors.

Section 109 of the Act provides that funds to cover the Board's annual budget (less registration and annual fees paid by public accounting firms) are to be collected from public companies (*i.e.*, "issuers," as defined in the Act). The amount due from such companies is referred to in the Act as the Board's "accounting support fee." The Board has adopted five proposed rules relating to public company funding of the Board's operations (PCAOB Rules 7100 through 7104), plus certain definitions that would appear in Rule 1001, to implement section 109 of the Act.

The Board's proposed rules provide for the accounting support fee to be allocated to, and payable by, two classes of issuers: (1) Publicly-traded

companies with average, monthly U.S. equity market capitalizations during the preceding year, based on all classes of common stock, of greater than \$25 million,¹ and (2) investment companies with average, monthly U.S. equity market capitalizations (or net asset values) of greater than \$250 million.² In recognition of the structure of investment companies and the relatively less-complex nature of investment company audits (as compared to operating company audits), investment companies would be assessed at a lower rate. All other issuers, including (1) those that are not required to file audited financial statements with the Commission, (2) employee stock purchase, savings and similar plans, and (3) bankrupt issuers that file modified reports, would be allocated shares of zero.³

(i) *Computation of Accounting Support Fee and Allocation to Issuers.* Once each year, the Board will compute the accounting support fee.⁴ The accounting support fee will be equal to the Board's budget for that year, as approved by the Commission, less the amount of registration and annual fees received during the prior year from public accounting firms.⁵

In establishing rules on the allocation of the accounting support fee, the Board was guided by two overarching principles that emanate from section 109 of the Act: that, generally, the accounting support fee must be allocated in a manner that reflects the proportionate sizes of issuers, and that, within that framework, the accounting support fee must be allocated in an

¹ The definition of "issuer market capitalization" in Rule 1001(i)(i) defines that term to include only the aggregate market value of securities traded in the United States, whether those securities are issued by entities based in the United States or elsewhere. The definition excludes the market value of securities traded outside the United States.

² This class would include both registered investment companies and issuers that have elected to be regulated as business development companies pursuant to section 54 of the Investment Company Act of 1940 ("Investment Company Act"). In the case of an investment company with multiple series, the average, monthly U.S. equity market capitalization, or net asset value, of each series would be measured against the \$250 million threshold separately.

³ In addition, issuers with average, monthly U.S. equity market capitalizations during the preceding year of less than \$25 million (or, in the case of investment companies, of less than \$250 million), issuers whose only outstanding public securities are debt securities would be allocated shares of zero, and issuers whose share price (or net asset value) on a monthly, or more frequent, basis is not publicly available.

⁴ Rule 7100. The Board anticipates that the accounting support fee will normally be computed during the first 30 days of each calendar year.

⁵ *Id.* The term "accounting support fee" is defined in Rule 1001(a)(i) by reference to Rule 7100.

equitable manner. These two principles are related in that, at least as a general matter, size of issuer may serve as an indication of the complexity of an audit, which could be an equitable measure on which to base allocation of the accounting support fee.

With respect to the measurability of issuers' proportionate sizes, the Board faces certain limitations. First, although section 109 provides a formula based on equity market capitalization by which to measure the proportionate sizes of issuers, market data may not be reliable or even regularly available⁶ with respect to some issuers, such as issuers that are not traded on an exchange or quoted on Nasdaq, issuers whose securities are otherwise illiquid, and certain investment companies, such as unit investment trusts and insurance company separate accounts. In addition, issuers whose only publicly-traded securities are debt securities do not have equity market capitalizations.

Second, to the extent that there are issuers, as that term is defined in section 2(a)(7) of the Act, that are not required to file audited financial statements, it may not be equitable to allocate any share of the accounting support fee to them. Further, while most investment companies file annual audited financial statements, the assets of many of those companies consist of investments in issuers who will have themselves been allocated shares of the accounting support fee.

In order to allocate the accounting support fee among issuers in a manner that takes into account the overarching principles and the inherent limitations of available data, the Board's proposed rules divide issuers into four classes:

(1) All issuers whose average, monthly U.S. equity market capitalization during the preceding calendar year, based on all classes of common stock, is greater than \$25 million and whose share price on a monthly, or more frequent, basis is publicly available.⁷ (Equity Issuers class)

(2) Registered investment companies and issuers that have elected to be regulated as business development companies whose average, monthly market capitalization (or net asset value), during the preceding calendar

year, is greater than \$250 million and whose share price (or net asset value) on a monthly, or more frequent, basis is publicly available.⁸ (Investment Company Issuers class) As discussed below, the allocation formula scales market capitalization (or, for investment companies whose securities are not traded on an exchange or quoted on Nasdaq, net asset value) of investment companies down by 90%, such that a \$250 million investment company would be allocated a share equal to that of a \$25 million operating company.

(3) All issuers that, as of the date the accounting support fee is calculated under Rule 7100, (i) have a basis, under a Commission rule or pursuant to other action of the Commission or its staff, not to file audited financial statements, (ii) are employee stock purchase, savings and similar plans, interests in which constitute securities registered under the Securities Act of 1933, as amended (the "Securities Act"), or (iii) are subject to the jurisdiction of a bankruptcy court and satisfy the modified reporting requirements of Commission Staff Legal Bulletin No. 2.⁹ (Issuers Permitted Not to File Audited Financial Statements and Bankrupt Issuers That File Modified Reports class)

(4) All other issuers (*i.e.*, issuers that do not fall in classes (1), (2), or (3)).¹⁰ (All Other Issuers class)

A company's status as an issuer (or as an investment company, business development company, issuer excused from filing audited financial statements, or bankrupt issuer) will be determined as of the date on which the amount of

the annual accounting support fee is set. Companies that are not issuers on that date will not be required to pay any fee during that year.

The accounting support fee will be allocated among the issuers in the four classes in the following manner:

(1) Each company in the Equity Issuer and Investment Company Issuer classes will be allocated an amount equal to the accounting support fee, multiplied by a fraction. The numerator of the fraction will be the issuer's average, monthly market capitalization during the preceding calendar year. The denominator will be the sum of the average, monthly market capitalizations of all Equity and Investment Company Issuers. For purposes of this allocation, however, the market capitalization of an investment company issuer will be ten percent of the investment company's market capitalization or net asset value.¹¹

(2) All issuers in the other two classes—issuers permitted not to file and all other issuers—will be allocated a share of zero.¹²

Issuers will be required to pay their allocated shares of the accounting support fee, rounded to the nearest hundred. Accordingly, issuers whose shares of the accounting support fee are less than \$50 will have their shares rounded to zero and will not be assessed a fee.

(ii) *Notice of Allocation and Collection.* Section 109 of the Act requires the Board to promulgate rules on assessment and collection of the accounting support fee. Accordingly, the proposed rules provide that, after the annual allocation of the accounting support fee is determined, the Board will send a notice to each issuer to which a share of the fee has been allocated.¹³ These notices will be sent either electronically or by first-class mail. Payment will be due on the 30th day after transmittal, after which interest will accrue at a rate of 6% per annum.¹⁴

The Board intends that notices will contain sufficient information to permit issuers to review the calculations by which their allocations were

⁶ Under section 109(g), the allocation of an issuer's share of the accounting support fee is to be based on the "average monthly equity market capitalization of the issuer for the 12-month period immediately preceding the beginning of the fiscal year to which" the budget relates.

⁷ Rule 7101(a). The Commission uses a similar threshold—public float of less than \$25 million—as one of the criteria for determining whether a company qualifies as a small business issuer. See 17 CFR 228.10.

⁸ Rule 7101(a)(2). The legislative history of the Act supports the Board's proposal to establish a separate class for investment company issuers and to allocate shares of the accounting support fee to members of that class at a reduced rate. See Floor Statement of Sen. Enzi, 148 Cong. Rec. S7356 (July 25, 2002):

I also believe that the Conferees expect that the Board and the standard setting body will deem investment companies registered under section 8 of the Investment Company Act of 1940 to be a class of issuers for purposes of establishing the fees pursuant to this section, and that investment companies as a class will pay a fee rate that is consistent with the reduced risk they pose to investors when compared to an individual company. Audits of investment companies are substantially less complex than audits of corporate entities. The failure to treat investment companies as a separate class of issuers would result in investment companies paying a disproportionate level of fees.

⁹ Rule 7101(a)(3). Paragraph (i) of this class currently includes (A) asset-backed issuers, (B) unit investment trusts, as defined in section 4(2) of the Investment Company Act, that have not filed or updated a registration statement that became effective during the preceding year, and (C) Small Business Investment Companies registered on Form N-5 under the Investment Company Act, that have not filed or updated a registration statement that became effective during the preceding year.

¹⁰ Rule 7101(a)(4).

¹¹ Rule 7101(b)(1).

¹² Rule 7101(b)(2).

¹³ Rule 7102. The Board will use its best efforts to send a notice to each issuer. Mailings will be to the address shown on such issuer's most recent periodic report filed with the Commission or submitted to the Commission's EDGAR system, unless the issuer provides another address to the Board. The Board's failure to send an issuer a notice, or the issuer's failure to receive a notice sent by the Board, will not excuse an issuer from its obligation to pay its share of the accounting support fee.

¹⁴ Rule 7103(a).

determined. Specifically, all notices will include the amount of the accounting support fee, the date on which the accounting support fee was calculated, the class in which the issuer was placed, the issuer's average, monthly U.S. equity market capitalization for the preceding year, and the sum of the average, monthly U.S. equity market capitalizations of all issuers in the Equity Issuer and Investment Company Issuer classes during the preceding year.¹⁵ Issuers that disagree with the class in which they have been placed, or with the calculation by which their allocations were determined, may petition the Board for a correction, in writing.¹⁶

If an issuer has not paid its share of the accounting support fee by the 60th day after a notice was sent, and the issuer does not have a petition pursuant to Rule 7102(c) pending, the Board may send a second notice by certified mail.¹⁷ If the Board has sent a second notice and payment has still not been made by the 90th day after the original notice was sent, the Board may report the issuer's non-payment to the Commission.¹⁸ An issuer's failure to pay its share of the accounting support fee is a violation of section 13(b)(2) of the Securities Exchange Act of 1934 ("Exchange Act") and could, like any other Exchange Act violation, result in administrative, civil, or criminal sanctions.¹⁹

In addition, the Board's proposed rules require that no registered public accounting firm may sign an unqualified audit opinion (or issue a consent) with respect to an issuer's financial statements if that issuer has outstanding any past-due share of the accounting support fee and the issuer has not filed a petition for a correction to its share of the accounting support fee.²⁰ The Board's proposed rules would permit a qualified, adverse or disclaimed opinion irrespective of whether the issuer's share had been paid.²¹ The collection

measures in the Board's proposed rules are intended to ensure the reliability of the independent funding source the Act provides for the Board and to promote fairness to all issuers allocated a share of the accounting support fee. The Board intends the requirement that auditors confirm payment of an issuer's share of the accounting support fee before issuing an unqualified audit opinion to serve as a reliable and cost-effective means of maintaining integrity in the assessment and collection process. A note to proposed Rule 7103(b) explains that a registered public accounting firm may confirm an issuer's payment of the accounting support fee by obtaining a management representation of payment. In addition, the Board plans to build systems that would enable auditors quickly and easily to ascertain whether their issuer audit clients have outstanding any past-due shares of the accounting support fee.

(iii) *Collection of Fees for Standard-Setting Body.* Under the Act, the standard-setting body designated by the Commission to establish accounting principles is also authorized to collect an accounting support fee from public companies to cover its annual budget.²² The Board's proposed rules recognize that, as contemplated in the Act, the standard-setting body could designate an agent to assess and collect its fees and the Board could be that agent.²³ If that occurs, the Board's assessment and collection of the standard-setting body's fees will be governed by the same rules as apply to the Board's fees.

Consistent with section 109(e) of the Act, the Board would not be responsible for calculating the standard-setting body's accounting support fee or for allocating its accounting support fee among issuers. While section 109 of the Act governs both the Board's and the standard-setting body's accounting support fee, the standard-setting body is not required to use the Board's allocation formula. If the standard-setting body designates the Board as its collection agent, however, the Board's proposed rules would effectively require the standard-setting body to agree to the same assessment and collection process (for example, rounding issuers' shares to the nearest hundred, and reporting issuers' non-payment to the Commission) as applies to the Board's accounting support fee. The Board

envisions that, if it is designated to serve as the standard-setting body's collection agent, issuers would receive one notice and make one payment. The notice would clearly distinguish between the amount that goes to the Board and the amount that goes to the accounting standard-setter, and it would provide issuers with separate calculations of how the amount of each assessment was reached.

(b) Statutory Basis

The statutory basis for the Board's proposed rules on funding is Title I of the Sarbanes-Oxley Act.

B. Board's Statement on Burden on Competition

The Board has stated that the proposed rules on funding do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of Title I of the Sarbanes-Oxley Act.

C. Board's Statement on Comments on the Proposed Rule Change Received From the Public

The proposed rules on funding were published for public comment in PCAOB Release No. 2003-002 (March 14, 2003). A copy of PCAOB Release No. 2003-002 and copies of the comment letters received in response to the PCAOB's request for comment are available on the PCAOB's Web site at <http://www.pcaobus.org>. The Board received eight written comments, from the following firms and individuals:

- a. Alcon, Inc.
- b. Boeing Company
- c. Deloitte & Touche
- d. Ernst & Young LLP
- e. Henjes, Conner, Williams & Grimsley
- f. Investment Company Institute
- g. KPMG
- h. Paul B.W. Miller, PhD, CPA, University of Colorado at Colorado Springs/Paul R. Bahnson, PhD, CPA, Boise State University

The Board both clarified and modified certain aspects of the proposed rules in response to the comments received. For instance, one commenter requested that the Board clarify how average monthly market capitalization would be determined. The proposed rules and release now explain that average monthly market capitalization will be based on closing prices on the last day of each month measured and, in general, on the number of shares outstanding reported in the issuer's periodic filings with the Commission.

Some commenters also requested that the Board broaden the classes of issuers described as "Equity Issuers" and "Investment Company Issuers," in

¹⁵ As discussed above, the allocation formula will use only 10 percent of the average, monthly market capitalization (or net asset value) of investment companies. Both the market capitalization (or net asset value) and the percentage thereof used in the formula will be disclosed as part of the notice.

¹⁶ Rule 7102(c). After the date on which the accounting support fee is calculated under Rule 7100 and allocated under Rule 7101, any change or recalculation of the share allocated to an issuer will not affect the share allocated to any other issuer. Rule 7101(c).

¹⁷ Rule 7103(c).

¹⁸ Rule 7103(c).

¹⁹ See sections 21C(a), 21(d), and 32(a) of the Exchange Act.

²⁰ Rule 7103(b).

²¹ Rule 7103(b) does not prevent, in any way, a registered accounting firm from publicly disclosing departures from GAAP, or any other reservations

about financial statements, that would be disclosed in a qualified opinion, an adverse opinion, or a disclaimer of an opinion. See *AICPA Codification of Statements on Auditing Standards*, AU §§ 508.20, 508.58-59, 508.61-62 (AICPA 2002).

²² See section 109(e) of the Act.

²³ Rule 7104.

proposed Rule 7101(a)(1) and (2), to include all public companies and investment companies, regardless of their market capitalizations, and also include issuers with only registered debt securities. Some commenters also suggested establishing a minimum fee for small issuers as an alternative to the formula provided in the Act. The Board's proposal to restrict the Equity Issuers class to issuers whose average monthly market capitalization exceeds \$25 million and to restrict the Investment Company class to issuers whose average monthly market capitalization (or net asset value) exceeds \$250 million was to ensure that the rules can be administered in a reliable and cost-effective manner. As discussed above, reliable market data is difficult to obtain with respect to issuers that are not traded on an exchange or on Nasdaq, and based on the Board's inquiry, data may not consistently be available with respect to issuers below the proposed rule's thresholds. Based in part on these comments, however, the Board has clarified Rule 7101(a) to more explicitly exclude from those classes issuers whose market capitalization (or net asset value) on a monthly, or more frequent, basis is not publicly available. Also, with respect to issuers of debt securities, section 109(g) of the Act only provides for the assessment of a share of the accounting support fee based on "equity" market capitalization.

The Board also received a comment suggesting that preferred stock should be included in the definition of issuer market capitalization. The Board proposed that the definition of issuer market capitalization include capitalization of all classes of common stock. After consideration, the Board believes that determining whether each issuer's preferred stock resembles equity or debt would unduly burden the Board's administration of its funding system. Therefore, the Board did not adopt this suggestion.

While one commenter supported the proposed rules with respect to investment companies as proposed, another commenter suggested that the 90 percent reduction in investment company market capitalizations (or net asset values), for purposes of calculating the accounting support fee in proposed Rule 7101(b)(1), was too great a reduction. This commenter did not provide any data to support its position, although it recommended further study of this issue. Based on a comparison of audit fees paid by investment companies to audit fees paid by publicly-traded companies, which was provided by the commenter who supported the Board's proposal, the

Board has determined that assessing investment companies at ten percent of that assessed public companies was appropriate.

In addition, the Board received several comments from accounting firms, suggesting that the Board rely on its referral of delinquent issuers to the Commission instead of require, pursuant to proposed Rule 7103(b), that registered public accounting firms ascertain, before signing an unqualified audit opinion, that issuer audit clients have no outstanding past-due shares of the accounting support fee. While the Board has proposed to refer delinquent issuers to the Commission, the uncertainty, given the Commission's limited resources and other priorities, that the Commission would bring civil actions against such issuers makes a referral alone an unreliable collections mechanism. These commenters also suggested that the Board clarify how this rule would work in practice. In response, the Board has clarified that Rule 7103(b) may be satisfied by obtaining a representation from the issuer that no past due share of the fee is outstanding. The Board has also made clear that an issuer that has filed a written petition for a correction of its share will not be deemed to have a past due share outstanding.

Finally, the Board held two informational meetings during the comment period, one in Washington, DC, and one in San Francisco, CA, with representatives of issuers to explain the proposed rules on funding. No substantive comments were received as a result of either meeting.

III. Date of Effectiveness of the Proposed Rule and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Board consents the Commission will:

- (a) By order approve the Board's proposed rules on funding; or
- (b) Institute proceedings to determine whether the Board's proposed rules on funding should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule is consistent with the requirements of Title I of the Sarbanes-Oxley Act and the Exchange Act. Persons making

written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule that are filed with the Commission, and all written communications relating to the proposed rule between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room in Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the PCAOB. All submissions should refer to File No. PCAOB-2003-02 and should be submitted by July 18, 2003.

By the Commission.
Margaret H. McFarland,
Deputy Secretary.
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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48066; File No. SR-Amex-2003-49]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the American Stock Exchange LLC To Revise Its Fee Schedule in Connection With the Administration of Forms U-4 and U-5 Through NASD's Web-Based Central Registration Depository System

June 19, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on May 28, 2003, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to revise its fee schedule in connection with the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.