

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-64816; File No. PCAOB-2011-02)

July 6, 2011

Public Company Accounting Oversight Board; Notice of Filing of Proposed Board Funding Final Rules for Allocation of the Board's Accounting Support Fee Among Issuers, Brokers, and Dealers, and Other Amendments to the Board's Funding Rules

Pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the "Act"), notice is hereby given that on June 21, 2011, the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "Commission") the proposed rules described in Items I and II 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 Rules

On June 14, 2011, the Board adopted amendments to its rules relating to the funding of the Board's operations (PCAOB Rules 7100 through 7106), and amended certain definitions that would appear in PCAOB Rule 1001, related to Section 109 of the Sarbanes-Oxley Act, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act¹ (the "Dodd-Frank Act") (collectively, "the proposed rules"). The text of the proposed rules is set out below (additions are underlined; deletions are in [brackets]).

RULES OF THE BOARD

SECTION 1. GENERAL PROVISIONS

* * *

Rule 1001. Definitions of Terms Employed in Rules.

* * *

(a)(i) [Accounting Support Fee][Reserved]

¹ Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010).

[The term “Accounting Support Fee” means the fee described in Rule 7100Sarbanes-Oxley Act of 2002, as amended.]

(a)(iii) Act

The term “Act” means the Sarbanes-Oxley Act of 2002, as amended.

* * *

(b)(iii) Broker

The term “broker” means a broker (as defined in Section 3(a)(4) of the Exchange Act), that is required to file a balance sheet, income statement, or other financial statement under Section 17(e)(1)(A) of that Act, where such balance sheet, income statement, or financial statement is required to be certified by a registered public accounting firm.

(b)(iv) Broker-Dealer Accounting Support Fee

The term “broker-dealer accounting support fee” means the portion of the accounting support fee established by the Board that is to be allocated among brokers and dealers pursuant to the rules of the Board.

* * *

(c)(iii) Common Equity

The term “common equity” means any class of common stock or an equivalent interest, including but not limited to a unit of beneficial interest in a trust or a limited partnership interest.

* * *

(d)(iii) Dealer

The term “dealer” means a dealer (as defined in Section 3(a)(5) of the Exchange Act), that is required to file a balance sheet, income statement, or other financial statement under Section 17(e)(1)(A) of that Act, where such balance sheet, income statement, or financial statement is required to be certified by a registered public accounting firm.

* * *

(i)(i) Issuer Market Capitalization

The terms “issuer market capitalization” and “market capitalization of an issuer” mean –

(1) Except as provided in paragraph (i)(i)(2) of this rule, the aggregate market value of all classes of an issuer’s voting and non-voting common [common stock]equity that trade in the United States; or

(2) With respect to an issuer: (i) that is registered under Section 8 of the Investment Company Act or has elected to be regulated as a business development company pursuant to Section 54 of the Investment Company Act, and (ii) whose securities are not traded on a national securities exchange or whose [quoted on Nasdaq]share price is not otherwise publicly available, the issuer's net asset value.

(i)(v) Issuer Accounting Support Fee

The term "issuer accounting support fee" means the portion of the accounting support fee established by the Board that is to be allocated among issuers pursuant to the rules of the Board.

* * *

(i)(n)(vi) [Notice]Invoice

The term "[notice]invoice" means the document sent by the Board to an issuer, broker, or dealer, pursuant to Rule 7103[2], setting forth such issuer's, broker's, or dealer's share of the accounting support fee under Section 109 of the Act and Rules 7101, [and]7102, and 7103.

* * *

(s)(v) Self-Regulatory Organization

The term "self-regulatory organization" means any national securities exchange, registered securities association, or registered clearing agency, or (solely for purposes of Sections 19(b), 19(c), and 23(b) of the Exchange Act) the Municipal Securities Rulemaking Board established by Section 15B of the Exchange Act.

* * *

(t)(ii) Tentative Net Capital

The term "tentative net capital" has the same meaning as such term is defined under Rule 15c3-1(c)(15) under the Exchange Act.

(t)(iii) Total Accounting Support Fee

The term "total accounting support fee" means the fee described in Rule 7100.

* * *

SECTION 7. FUNDING

* * *

Rule 7100. Accounting Support Fees.

The Board shall [calculate]establish a total[n] accounting support fee each year in accordance with the Act. The total accounting support fee shall be equitably allocated between issuers (the "issuer accounting support fee") and brokers and dealers (the

“broker-dealer accounting support fee”). [The accounting support fee shall equal the budget of the Board, as approved by the Commission, less the sum of all registration fees and annual fees received during the preceding calendar year from public accounting firms, pursuant to Section 102(f) of the Act and the Rules of the Board.]The accounting support fees shall then be equitably allocated among issuers, in accordance with Rule 7101(b), and among brokers and dealers, in accordance with Rule 7102(b).

Rule 7101. Allocation of Issuer Accounting Support Fee.

(a) Classes of Issuers

For purposes of allocating the issuer accounting support fee, those entities that are issuers as of the date the issuer accounting support fee is calculated[under Rule 7100] shall be divided into four classes:

(1) Equity Issuers

All issuers whose average, monthly issuer market capitalization is greater than \$75 million during the [preceding]calendar year preceding the date the issuer accounting support fee is calculated[is greater than \$25 million], other than those described in paragraphs (a)(2) and (a)(3) of this Rule, and whose share price on a monthly, or more frequent, basis is publicly available.

Note: The [Average,]monthly issuer market capitalization will be based on closing [stock]share price[s] of all classes of the issuer’s voting and non-voting common equity on the closest trading day on or before the last day of each calendar month [measured]during which trading in the common equity occurred.

(2) Investment Company Issuers

All issuers (i) who, as of the date the accounting support fee is calculated[under Rule 7100], are registered under Section 8 of the Investment Company Act or have elected to be regulated as business development companies pursuant to Section 54 of the Investment Company Act, other than those described in paragraph (a)(3), (ii) whose average, monthly issuer market capitalization is greater than \$500 million during the [preceding]calendar year preceding the date the issuer accounting support fee is calculated[is greater than \$250 million], and (iii) whose share price (or net asset value) on a monthly, or more frequent, basis is publicly [-]available.

Note: [Average]The[,] monthly issuer market capitalization will be based on closing [stock]share price[s]of all classes of the issuer’s voting and non-voting common equity on the closest trading day on or before the last day of each calendar month [measured]during which trading in the common equity occurred.

(3) Issuers Permitted Not to File Audited Financial Statements and Bankrupt Issuers that File Modified Reports

All issuers that, as of the date the issuer accounting support fee is calculated[

under Rule 7100], (i) have a basis, under the federal securities laws, a Commission rule, or pursuant to other action of the Commission or its staff, not to file audited financial statements with the Commission, (ii) are employee stock purchase, savings, and similar plans, interests in which constitute securities registered under the Securities Act, or (iii) are subject to the jurisdiction of a bankruptcy court and [satisfy]have provided an opinion of counsel that the issuer satisfies the modified reporting requirements of Commission Staff Legal Bulletin No. 2.

Note: [As of April 16, 2003, i]Issuers within paragraph (a)(3)(i) of this Rule include (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]calendar year preceding the date the issuer accounting support fee is calculated, 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 calendar year preceding the date the issuer accounting support fee is calculated[preceding year].

(4) All Other Public Company Issuers

All issuers other than those described in paragraphs (a)(1), (a)(2), or (a)(3) of this Rule.

(b) Allocation of Issuer Accounting Support Fee Among Issuers

The issuer accounting support fee shall be allocated among the classes in paragraph (a) of this Rule as follows:

(1) Equity and Investment Company Issuers

Each issuer described in paragraph (a)(1) and (a)(2) of this Rule shall be allocated a share of the issuer accounting support fee in an amount equal to the issuer accounting support fee multiplied by a fraction –

(i) the numerator of which is the average, monthly market capitalization of the issuer during the [preceding]calendar year preceding the date the issuer accounting support fee is calculated, except that for issuers described in paragraph (a)(2) of this Rule, the numerator is one-tenth of the average, monthly issuer market capitalization of the issuer; and

(ii) the denominator of which is the sum of the average, monthly market capitalizations of the issuers described in paragraph (a)(1) of this Rule and one-tenth of the average, monthly market capitalizations of the issuers described in paragraph (a)(2) of this Rule.

(2) All Other Classes

Each issuer described in paragraphs (a)(3) and (a)(4) of this Rule shall be

allocated a share of the issuer accounting support fee equal to \$0.

(c) Adjustments

After the issuer accounting support fee is calculated [under Rule 7100]and allocated under this Rule, any adjustment to the share allocated to an issuer shall not affect the share allocated to any other issuer.

Rule 7102. Allocation of Broker-Dealer Accounting Support Fee

(a) Classes of Brokers and Dealers

For purposes of allocating the broker-dealer accounting support fee, those entities that are brokers or dealers as of the date the broker-dealer accounting support fee is calculated shall be divided into two classes:

(1) Brokers and Dealers with Average, Quarterly Tentative Net Capital Greater than \$5 million

All brokers and dealers whose average, quarterly tentative net capital is greater than \$5 million during the calendar year preceding the date the broker-dealer accounting support fee is calculated, other than those described in paragraphs (a)(2) of this Rule.

Note: Average, quarterly tentative net capital will be based on the tentative net capital reported by the broker or dealer in the calendar quarterly reports filed pursuant to Commission rules during the calendar year preceding the date the broker-dealer accounting support fee is calculated.

(2) Brokers and Dealers Permitted Not to File Audited Financial Statements and Brokers and Dealers Not Described in Paragraph (a)(1) of This Rule

All brokers and dealers that, as of the date the broker-dealer accounting support fee is calculated, (i) have a basis, under the federal securities laws, a Commission rule, or pursuant to other action of the Commission or its staff, not to file audited financial statements or (ii) are not described in paragraph (a)(1) of this Rule.

(b) Allocation of Broker-Dealer Accounting Support Fee

The broker-dealer accounting support fee shall be allocated among the classes in paragraph (a) of this Rule as follows:

(1) Brokers and Dealers with Average, Quarterly Tentative Net Capital Greater than \$5 million

Each broker and dealer described in paragraph (a)(1) of this Rule shall be allocated a share of the broker-dealer accounting support fee in an amount equal to the broker-dealer accounting support fee multiplied by a fraction –

(i) the numerator of which is the average, quarterly tentative net capital of the broker or dealer during the calendar year preceding the date the broker-dealer accounting support fee is calculated; and

(ii) the denominator of which is the sum of the average, quarterly tentative net capital of the brokers and dealers described in paragraph (a)(1) of this Rule.

(2) All Other Brokers and Dealers

Each broker and dealer described in paragraph (a)(2) of this Rule shall be allocated a share of the broker-dealer accounting support fee equal to \$0.

(c) Adjustments

After the broker-dealer accounting support fee is calculated and allocated under this Rule, any adjustment to the share allocated to a broker or dealer shall not affect the share allocated to any other broker or dealer.

Rule 7103[2]. Assessment of Accounting Support Fees.

(a) Amount of Assessment

Each issuer and each broker and dealer is required to pay its share of the accounting support fee, as allocated under Rules 7101 and 7102, rounded to the nearest [hundred]\$100.

Note: If the allocated[an issuer's] share of the accounting support fee to an issuer, broker, or dealer is less than \$50, [that issuer]the assessed share of the accounting support fee will [not]be [assessed]zero. If the [issuer's]allocated share of the accounting support fee is [exactly]\$50 or \$50 more than [a]the closest multiple of \$100, then the assessed share will be rounded up to the nearest \$100.

(b) Notice of Assessment

The Board will use its best efforts to send an an [notice]invoice to each issuer, broker, and dealer, either electronically or by first-class mail, at the address shown in [on such issuer's]the most recent periodic report filed with the Commission by the issuer, or with the designated self-regulatory organization by the broker or dealer, at the address [submitted to]contained in the Commission's EDGAR system or the broker's or dealer's designated self-regulatory organization, or at such other address as the issuer, broker, or dealer provides to the Board. The Board's failure to send an issuer, broker, or dealer an an [notice]invoice, or the [issuer's]failure to receive an [notice]invoice sent by the Board, shall not constitute a waiver of the Board's right to assess the issuer, broker, or dealer[such issuer] for its share of the accounting support fee or of the issuer's, broker's, or dealer's responsibility to pay its share of the accounting support fee.

(c) Petition for Correction

Any issuer, broker, or dealer who disagrees with the class in which it has been placed, or with the calculation by which its share of the accounting support fee was determined, may petition the Board for a correction of the share of the accounting support fee it was allocated. Any such petition shall include an explanation of the nature of the claimed mistake in classification or calculation in writing and must be filed with the Board, on or before the 6[3]0th day after the [notice]invoice is sent, or within such longer period as the Board allows for good cause shown. After a review of such a petition, the Board will determine whether the allocation is consistent with Section 109 of the Act and the Board's rules thereunder and provide the issuer a written explanation of its decision. The provisions of Rule 7104[3] shall be suspended while such a petition is pending before the Board.

Rule 7104[3]. Collection of Accounting Support Fees.

(a) Accounting Support Fee Payment Due Date

Unless the Board directs otherwise, payment shall be due on the 30th day after the [notice]invoice is sent. Beginning on the 31st day, payment shall be deemed past due and interest shall accrue at a rate of 6 percent per annum.

(b) [Confirmation]Determination of Payment of Accounting Support Fees by Registered Accounting Firm

(1) Except as provided in paragraph (b)(2) of this Rule, no registered public accounting firm shall:

(i) ___ sign an unqualified audit opinion with respect to an issuer's, broker's, or dealer's financial statements, [or]

(ii) ___ issue a consent to include an audit [opinion]report issued previously, or

(iii) ___ sign a document, report, notice, or other record concerning procedures or controls of any issuer, broker, or dealer required under the securities laws

unless the registered public accounting firm has ascertained that the issuer (including any broker or dealer subsidiary of the issuer), broker, or dealer has outstanding no past-due share of the issuer accounting support fee or broker-dealer accounting support fee, whichever is applicable, or has a petition pursuant to Rule 7103[2](c) pending.

(2) A registered public accounting firm may:

(i) ___ sign an unqualified audit opinion with respect to an issuer's, broker's, or dealer's financial statements, [or]

(ii) ___ issue a consent to include an audit [opinion]report issued previously, or

(iii) sign a document, report, notice, or other record concerning procedures or controls of any issuer, broker, or dealer required under the securities laws

even though the issuer (including any broker or dealer subsidiary of the issuer), broker, or dealer has outstanding a past-due share of the accounting support fee and has not filed a petition under Rule 7103[2](c), if the issuer, broker, or dealer needs the audit report or consent in order to submit a report to, or make a filing with, the Commission or, in the case of an issuer only, to issue securities. The [issuer]registered public accounting firm shall submit to the Board a notice of the signing of the opinion or issuance of the consent not later than the next business day after the filing is made with the Commission. This exception to paragraph (b)(1) of this Rule shall not continue longer than 15 business days after the earlier of the date of the notice's submission or the filing of the report with the Commission, and may not be invoked for more than one such period with respect to any share of the accounting support fee that the issuer, broker, or dealer is assessed under Rule 7103[2].

Note 1: A registered public accounting firm may ascertain that an issuer, broker, or dealer has no outstanding past-due share of the accounting support fee by obtaining a representation from the issuer, broker, or dealer[or a confirmation from the Board that no past-due share of the accounting support fee is outstanding].

Note 2: A notice pursuant to paragraph (b)(2) of this Rule must be submitted electronically by email to rule7104[3]stay@pcaobus.org.

Note 3: For purposes of Rule 7104, the term "audit" means an examination of the financial statements, reports, documents, procedures, controls, or notices of any issuer, broker, or dealer by an independent public accounting firm in accordance with the rules of the Board or the Commission, for the purpose of expressing an opinion on the financial statements or providing an audit report. For purposes of Rule 7104, the term "audit report" means a document, report, notice, or other record (1) prepared following an audit performed for purposes of compliance by an issuer, broker, or dealer with the requirements of the securities laws; and (2) in which a public accounting firm either (i) sets forth the opinion of that firm regarding a financial statement, report, notice, or other document, procedures, or controls; or (ii) asserts no such opinion can be expressed.

(c) Reports [to the Commission]of Non-payment[of an Accounting Support Fee]

(1) If an issuer has not paid its share of the issuer accounting support fee by the 60th day after the [notice]invoice was sent, and the issuer does not have a petition pursuant to Rule 710[2]3(c) pending, the Board may send a second [notice]invoice to such issuer by certified mail. If the Board has sent such a second [notice]invoice and has not been paid by the 90th day after the original [notice]invoice was sent, the Board may report the issuer's nonpayment to the Commission.

Note: Section 13(b)(2) of the Exchange Act provides, in part, that: “Every issuer which has a class of securities registered pursuant to section 12 of this title and every issuer which is required to file reports pursuant to section 15(d) of this title shall – * * * (C) notwithstanding any other provision of law, pay the allocable share of such issuer of a reasonable accounting support fee or fees, determined in accordance with Section 109 of the Sarbanes-Oxley Act of 2002.”

(2) If a broker or dealer has not paid its share of the broker-dealer accounting support fee by the 60th day after the invoice was sent, and the broker or dealer does not have a petition pursuant to Rule 7103(c) pending, the Board may send a second invoice to such broker or dealer by certified mail. If the Board has sent such a second invoice and has not been paid by the 90th day after the original invoice was sent, the Board may report the broker’s or dealer’s nonpayment to the Commission and/or the broker’s or dealer’s designated self-regulatory organization.

Note: Section 109(h)(1) of the Act provides that “[e]ach broker or dealer shall pay to the Board the annual accounting support fee allocated to such broker or dealer under this section.”

[(d) Excess Fees

If in any Board fiscal year, the Board receives fees in excess of the budget for that fiscal year, the Board shall hold those excess fees in escrow. Such escrowed excess fees shall be released to the Board at the beginning of the next fiscal year and shall reduce the Board’s accounting support fee in that next fiscal year.]

Rule 7105[4]. Service as Designated Collection Agent.

If the Board is designated to serve as collection agent for an accounting support fee of a standard-setting body designated by the Commission pursuant to Section 19(b) of the Securities Act, the assessment and collection of the accounting support fee shall be governed by Rules 7103 and [2 and]7104[3] as if the accounting support fee of the standard-setting body were the issuer accounting support fee of the Board.

Rule 7106. [(d)]Excess [Fees]Funds.

If in any Board fiscal year, the Board receives [fees]funds in excess of the budget of the Board for that fiscal year, as approved by the Commission, the Board shall hold those excess [fees]funds in escrow. Such escrowed excess [fees]funds shall be released to the Board at the beginning of the next fiscal year and shall reduce the Board’s total accounting support fee in that next fiscal year.

II. Board’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rules and discussed any comments it received on

the proposed rules. 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 Rules

(a) Purpose

Section 109 of the Sarbanes-Oxley Act, as originally enacted, provided that funds to cover the Board’s annual budget (less registration and annual fees paid by public accounting firms²) would be collected from issuers³ based on each issuer’s relative average, monthly equity market capitalization.⁴ The amount due from issuers was referred to as the Board’s “accounting support fee.”

Section 982 of the Dodd-Frank Act granted the Board oversight of the audits of brokers and dealers registered with the Commission.⁵ To provide funds for the Board’s oversight of those audits, the Dodd-Frank Act amended Section 109 of the Sarbanes-Oxley Act to require that the Board allocate a portion of the accounting support fee among brokers and dealers, or classes of brokers and dealers, based on their relative “net capital (before or after any adjustments).”⁶

² Section 102(f) of the Sarbanes-Oxley Act, states that registered public accounting firms shall pay fees sufficient for the Board to recover the costs of processing and reviewing registration applications and annual reports.

³ Section 2(a)(7) of the Sarbanes-Oxley Act and PCAOB rules define “issuer” to mean an issuer (as defined in Section 3 of the Securities Exchange Act of 1934 (“Exchange Act”), the securities of which are registered under Section 12 of the Exchange Act, or that is required to file reports under Section 15(d) of the Exchange Act, or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933, and that it has not withdrawn. See PCAOB Rule 1001(i)(iii).

⁴ Section 109(g) of the Sarbanes-Oxley Act.

⁵ For information regarding the audit of brokers’ and dealers’ financial statements and examination of reports regarding compliance with Commission requirements, see generally Rule 17a-5 under the Exchange Act and related SEC rules and forms.

As amended by the Dodd-Frank Act, Section 109 of the Sarbanes-Oxley Act requires that the rules of the Board provide for the equitable allocation, assessment, and collection by the Board of the accounting support fee among issuers, brokers, and dealers, and allow “for differentiation among classes of issuers, brokers, and dealers, as appropriate.”⁷ This section further provides that “[t]he amount due from a broker or dealer shall be in proportion to the net capital of the broker or dealer (before or after any adjustments), compared to the total net capital of all brokers and dealers (before or after any adjustments), in accordance with rules issued by the Board.”⁸

Accordingly, the Board adopted amendments to its funding rules to allocate a portion of the accounting support fee among brokers and dealers,⁹ to establish classes of brokers and dealers for funding purposes, to describe the methods for allocating the appropriate portion of the accounting support fee to each broker and dealer within each class, and to address the collection of the assessed share of the broker-dealer accounting support fee from brokers and dealers.

In addition, the proposed rules include amendments to the Board’s funding rules with respect to the allocation, assessment, and collection of the accounting support fee

⁶ Sections 109(d)(2) and 109(h) of the Sarbanes-Oxley Act, which state, in part, that amounts due from brokers and dealers “shall be in proportion to the net capital of the broker or dealer (before or after any adjustments).”

⁷ Section 109(d)(2) of the Sarbanes-Oxley Act. Pursuant to Section 109(e) of the Sarbanes-Oxley Act, the Financial Accounting Standards Board (“FASB”) accounting support fee is to be allocated among issuers. Brokers and dealers therefore will not be allocated a portion of the FASB annual accounting support fee.

⁸ Section 109(h)(3) of the Sarbanes-Oxley Act.

⁹ The PCAOB is amending its rules to add definitions of “broker” and “dealer” consistent with the definitions that the Dodd-Frank Act added to Section 110 of the Sarbanes-Oxley Act. These definitions incorporate the definition of “broker” in Section 3(a)(4) of the Exchange Act and “dealer” in Section 3(a)(5) of the Exchange Act, but only include those brokers or dealers that are required to file a balance sheet, income statement, or other financial statement certified by a registered public accounting firm. See Sections 110(3) and (4) of the Sarbanes-Oxley Act.

among issuers. The proposed rules (i) revise the basis for calculating an issuer's market capitalization to include the market capitalization of all classes of the issuer's voting and non-voting common equity, and (ii) increase the average, monthly market capitalization thresholds in the funding rules for classes of equity issuers and investment companies. Further, based on eight years' experience administering the funding process, the proposed rules include technical amendments to the Board's funding rules.

On December 14, 2010, the Board published for public comment proposed amendments to its funding rules to provide for a portion of the accounting support fee to be allocated among brokers and dealers with average, quarterly tentative net capital of greater than \$5 million.¹⁰ The Board sought comment on all aspects of the proposed rules. The Board received eight comments in total, consisting of four comments from accounting firms, two from associations of accountants or auditors, one from an organization representing independent broker-dealers, and one from a small broker and dealer. Generally, commenters supported the amendments. As discussed more fully in Exhibit 3 in the PCAOB's filing with the Commission, on June 14, 2011, the Board adopted the proposed rules, which are substantially similar to those proposed on December 14, 2010.

(b) Statutory Basis

The statutory basis for the proposed rules is Title I of the Sarbanes-Oxley Act.

B. Board's Statement on Burden on Competition

The Board does not believe that the proposed rules on funding will result in any burden on competition. The proposed rule changes would apply equally to all issuers,

¹⁰ PCAOB Release No. 2010-009, Board Funding: Proposal for Allocation of the Board's Accounting Support Fee Among Issuers, Brokers, and Dealers, and Other Amendments to the Board's Funding Rules (December 14, 2010); PCAOB Rulemaking Docket Matter No. 033 (the "proposing release").

brokers, and dealers and pursuant to the statutory formula, issuers, brokers, and dealers will generally pay a fee that is proportionate to the size of their equity market capitalization, for issuers, and tentative net capital, for brokers and dealers. In addition, the proposed rules would provide for a fee of zero for issuers with average, monthly equity market capitalization of less than \$75 million (or, for investment company issuers, less than \$500 million) and for brokers and dealers with \$5 million or less of average, quarterly tentative net capital.

C. Board’s Statement on Comments on the Proposed Rules Received from Members, Participants or Others

The Board released the proposed rules for public comment in PCAOB Release No. 2010-009 (December 14, 2010). The Board received eight written comment letters relating to its initial proposed rules. The Board has carefully considered all comments received. The Board’s response to the comments it received and the changes made to the rules in response to the comments received are discussed below.

Brokers and Dealers

As amended by the Dodd-Frank Act, Section 109 of the Sarbanes-Oxley Act requires that the rules of the Board provide for the equitable allocation, assessment, and collection by the Board of the accounting support fee among issuers, brokers, and dealers, and allow “for differentiation among classes of issuers, brokers, and dealers, as appropriate.”¹¹ This section further provides that “[t]he amount due from a broker or dealer shall be in proportion to the net capital of the broker or dealer (before or after any

¹¹ Section 109(d)(2) of the Sarbanes-Oxley Act. Pursuant to Section 109(e) of the Sarbanes-Oxley Act, the Financial Accounting Standards Board (“FASB”) accounting support fee is to be allocated among issuers. Brokers and dealers therefore will not be allocated a portion of the FASB annual accounting support fee.

adjustments), compared to the total net capital of all brokers and dealers (before or after any adjustments), in accordance with rules issued by the Board.”¹²

Accordingly, the Board is adopting amendments to its funding rules to allocate a portion of the accounting support fee among brokers and dealers,¹³ to establish classes of brokers and dealers for funding purposes, to describe the methods for allocating the appropriate portion of the accounting support fee to each broker and dealer within each class, and to address the collection of the assessed share of the broker-dealer accounting support fee from brokers and dealers.

Pursuant to Section 109(d)(3) of the Sarbanes-Oxley Act, as amended by the Dodd-Frank Act, the PCAOB is to begin the allocation, assessment, and collection of the accounting support fee from brokers and dealers to fund the first full fiscal year beginning after the date of the enactment of the Dodd-Frank Act, which is the Board’s 2011 fiscal year. Accordingly, the amendments to its funding rules for brokers and dealers are effective, subject to approval by the SEC, for the allocation, assessment, and collection of the accounting support fee for brokers and dealers in 2011.¹⁴

A. The Broker-Dealer Accounting Support Fee

The Report of the Senate Committee on Banking, Housing, and Urban Affairs that accompanied the legislation that would become the Dodd-Frank Act stated:

¹² Section 109(h)(3) of the Sarbanes-Oxley Act.

¹³ The PCAOB is amending its rules to add definitions of “broker” and “dealer” consistent with the definitions that the Dodd-Frank Act added to Section 110 of the Sarbanes-Oxley Act. These definitions incorporate the definition of “broker” in Section 3(a)(4) of the Exchange Act and “dealer” in Section 3(a)(5) of the Exchange Act, but only include those brokers or dealers that are required to file a balance sheet, income statement, or other financial statement certified by a registered public accounting firm. See Sections 110(3) and (4) of the Sarbanes-Oxley Act.

¹⁴ The Board expects that the initial allocation, assessment, and collection of the accounting support fee for brokers and dealers will take place during the fall of 2011.

The Committee expects that the PCAOB will reasonably estimate the amounts required to fund the portions of its programs devoted to the oversight of audits of brokers and dealers, as contrasted to the oversight of audits of issuers, in deciding the total amounts to be allocated to, assessed, and collected from all brokers and dealers...Cost accounting for each program is not required.¹⁵

In accordance with this expectation, the Board each year will reasonably estimate amounts required to fund the portions of the Board's programs devoted to the oversight of audits of issuers and the amounts required to fund the portions of its programs devoted to the oversight of the audits of brokers and dealers. At the time the Board establishes a total accounting support fee, it also will allocate the respective portions of the total accounting support fee among issuers (the "issuer accounting support fee") and among brokers and dealers (the "broker-dealer accounting support fee"). In accordance with Section 109(b) of the Sarbanes-Oxley Act, the Board's budget, which includes the total accounting support fee and the portion of the total accounting support fee to be allocated to issuers and the portion to be allocated to brokers and dealers, is subject to the Commission's approval.

B. Classes of Brokers and Dealers

The Board is establishing classes of brokers and dealers for funding purposes to allow for the equitable distribution of the accounting support fee. Establishing classes allows the Board to allocate the broker-dealer accounting support fee to those brokers and dealers whose audits, due to their relative size and complexity, may require more Board time and resources during an inspection than other audits of brokers and dealers with relatively small and less complex operations.

Further, because Section 109 requires that allocations be based on a broker's or dealer's net capital "before or after any adjustments," the Board is basing the classes of

¹⁵ S. Rep. No. 176, 111th Cong., 2d Sess. (April 30, 2010) at 154.

brokers and dealers on the average “tentative net capital” reported at the end of the calendar quarters during the previous calendar year. “Tentative net capital” is defined in the Board’s rules to have the same meaning that the term has in Rule 15c3-1(c)(15) under the Exchange Act.¹⁶ This definition generally provides that the “tentative net capital” of a broker or dealer is its net capital before deducting certain securities haircuts and changes in inventory used in calculating the broker’s or dealer’s net capital. Because the investment decisions made by a broker or dealer can influence the amount of these deductions and thus influence the net capital calculation, “tentative net capital” may be a more consistent basis for allocation of the broker-dealer accounting support fee. Both net capital and tentative net capital amounts are reported by brokers and dealers on their quarterly FOCUS reports filed on Form X-17A-5.¹⁷

In considering the effect of this measurement criterion at the proposal phase, the Board reviewed the tentative net capital of 4,656 brokers and dealers as of the third and fourth quarters of 2009 and the first and second quarters of 2010.¹⁸ Registered brokers and dealers had average, quarterly tentative net capital amounts for the four quarters ranging up to approximately \$15.8 billion. Thirty-three brokers and dealers, however, held approximately 80.1% of the total average, quarterly tentative net capital maintained by all 4,656 brokers and dealers. In addition, only 120 brokers and dealers each had average, quarterly tentative net capital in excess of \$100 million, 452 brokers and dealers

¹⁶ “Tentative net capital” is the net capital of a broker or dealer before certain adjustments. See Rule 15c3-1(c)(15) under the Exchange Act.

¹⁷ See generally, Rule 17a-5 under the Exchange Act. The tentative net capital and net capital amounts may be reported in Part I, II, and IIA of the FOCUS report and are unaudited.

¹⁸ The data used by the Board for these purposes represents data for brokers and dealers that (i) are members of Financial Industry Regulatory Authority (“FINRA”) and have designated FINRA as their designated examining authority (“DEA”); or (ii) are members of FINRA and have designated another self-regulatory organization as their DEA but file FOCUS information with FINRA on a voluntary basis.

each had average, quarterly tentative net capital in excess of \$10 million, and 638 brokers and dealers had average, quarterly tentative net capital in excess of \$5 million. The Board has reviewed the tentative net capital of 4,750 brokers and dealers as of the four calendar quarters of 2010 and noted no significant differences with amounts reviewed during the proposal phase of this project.

Approximately 86.3% of the brokers and dealers included in the statistics reviewed by the staff have average, quarterly tentative net capital of less than \$5 million. At the same time, the total average, quarterly tentative net capital for all brokers and dealers in that group was approximately 1.1% of the total average, quarterly tentative net capital for all brokers and dealers. Conversely, approximately 13.7% of all brokers and dealers have approximately 98.9% of the total average, quarterly tentative net capital.

Based on the above analysis, which illustrates the significant number of brokers and dealers with average, quarterly tentative net capital of less than \$5 million, the Board is establishing two classes of brokers and dealers for purposes of the accounting support fee: (1) those with average, quarterly tentative net capital greater than \$5 million and (2) those with average, quarterly tentative net capital less than or equal to \$5 million or not filing audited financial statements pursuant to a Commission rule or other action of the Commission or its staff (sometimes referred to as a “\$5 million threshold” in the release).¹⁹ The average would be based on the tentative net capital as of the end of the

¹⁹ Brokers or dealers with larger tentative net capital amounts may be “clearing” or “carrying” brokers and dealers rather than “introducing” brokers and dealers. Because of the nature of their businesses, audits of the compliance reports for clearing or carrying brokers and dealers may require more testing and documentation than audits of introducing brokers and dealers. PCAOB inspections of audits of brokers’ and dealers’ financial statements and examinations of reports regarding compliance with Commission and regulatory requirements of brokers and dealers with larger amounts of tentative net capital, consequently, may require more Board resources.

calendar quarters of the calendar year immediately prior to the Board's calculation of the broker-dealer accounting support fee.²⁰

C. Allocation of the Broker-Dealer Accounting Support Fee

Consistent with Section 109 of the Sarbanes-Oxley Act, the PCAOB funding rules allocate to brokers and dealers in the class with average, quarterly tentative net capital greater than \$5 million a share of the broker-dealer accounting support fee based on a ratio where the numerator is the average, quarterly tentative net capital of the broker or dealer for the calendar quarters of the immediately prior calendar year and the denominator is the sum of the average, quarterly tentative net capital of all the brokers and dealers in this class.

Under these rules, brokers and dealers with average, quarterly tentative net capital equal to or less than \$5 million will be allocated a share of the broker-dealer accounting support fee equal to zero.²¹ The Board chose the \$5 million tentative net capital threshold because it was concerned that, due to the concentration of the industry's aggregate tentative net capital among relatively few brokers and dealers, the allocation of the broker-dealer accounting support fee below the \$5 million threshold could impose a relatively costly administrative burden on many smaller brokers and dealers. At the same

²⁰ Brokers and dealers generally file quarterly reports within 17 business days after the end of the calendar quarter. See, for example, Rules 17a-5(a)(2)(ii) and (iii) under the Exchange Act.

²¹ Assigning a broker or dealer a share of the accounting support fee equal to zero when its average, quarterly tentative net capital is equal to or less than \$5 million does not affect the Board's oversight of the audits of that broker or dealer. The Dodd-Frank Act amendments to the Sarbanes-Oxley Act state that if the Board establishes a program of inspection for audits of brokers and dealers, it shall consider whether differing inspection schedules are appropriate for auditors of brokers or dealers that do not receive, hold, or handle customer securities, and that the Board may exempt certain auditors from its inspection program and, consequently, from registration with the Board. See Section 104(a)(2) of the Sarbanes-Oxley Act. Any Board decisions in these matters would be made only after additional rulemakings specific to the Board's inspection and registration programs for auditors of brokers and dealers and would be subject to Commission approval. If the Board decides at a later time that auditors of certain groups of brokers or dealers are exempt from the Board's inspection program and, therefore, eligible to withdraw from registration with the PCAOB, no share or portion of any accounting support fee paid by any broker or dealer would be refundable.

time, based on the Board's analysis, allocating a share of the broker-dealer accounting support fee equal to zero to such small entities should have a negligible effect on the share of the broker-dealer accounting support fee allocated to the larger brokers and dealers.

For example, based on the data for the third and fourth quarters of 2009 and the first and second quarters of 2010, assuming a broker-dealer accounting support fee of \$15 million,²² if no average, quarterly tentative net capital threshold was applied, 1,557 brokers and dealers would be allocated a share of the broker-dealer accounting support fee of \$100 or more.²³ The aggregate share of the broker-dealer accounting support fee allocated to brokers and dealers with average, quarterly tentative net capital of \$5 million or less, however, would be \$141,700, representing 0.9% of the assumed \$15 million broker-dealer accounting support fee.

Under the \$5 million threshold, assuming a broker-dealer accounting support fee of \$15 million, approximately 638 brokers and dealers would be allocated a share of the broker-dealer accounting support fee. Under this threshold, 919 fewer brokers and dealers are allocated a share of the broker-dealer accounting support fee. In addition, under the \$5 million threshold, the share of the broker-dealer accounting support fee assessed to brokers and dealers with average, quarterly tentative net capital less than \$45 million (but above the \$5 million threshold) would be the same as under the no threshold

²² On November 23, 2010, the Board approved its 2011 budget, which included a total accounting support fee of approximately \$202.3 million. The allocated portion of the total accounting support fee to brokers and dealers, which is referred to as the broker-dealer accounting support fee, was approximately \$14.4 million for 2011. There is no assurance that future broker-dealer accounting support fees will be the same as the 2011 broker-dealer accounting support fee.

²³ The allocated share for each of the remaining 3,099 brokers and dealers would be less than \$50 and, therefore, under the Board's rules rounded down to zero. See PCAOB Rule 7103(a).

scenario discussed above.²⁴ The share of the broker-dealer accounting support fee assessed to brokers and dealers with average, quarterly tentative net capital greater than \$45 million under the \$5 million threshold would increase by less than 2.0% of the assessed share of the fee under the no threshold scenario.

Because the accounting support fee will be divided into an issuer accounting support fee and a broker-dealer accounting support fee, it is possible that affiliated entities may be allocated separate shares of both the issuer and broker-dealer accounting support fees. For example, if an issuer has one or more broker or dealer subsidiaries, the issuer may be allocated a share of the issuer accounting support fee and each broker or dealer subsidiary may be allocated a share of the broker-dealer accounting support fee. The allocations are designed to support oversight programs tailored to the audits of different types of entities. The issuer is responsible for payment of the allocated share of the issuer accounting support fee and each broker-dealer subsidiary is responsible for payment of its allocated share of the broker-dealer accounting support fee.

D. Collection

The Board is adopting amendments to its rules regarding the assessment and collection of the accounting support fee to include appropriate references to brokers and dealers.

Currently, if a share of the accounting support fee allocated to an issuer is past-due²⁵ and the issuer has not filed a petition with the Board seeking correction of its

²⁴ The allocated share of the broker-dealer accounting support fee for 48 out of 441 brokers and dealers with average, quarterly tentative net capital between \$5 million and \$45 million may increase by \$100 because the additional allocated amount would result in the unrounded allocated share being \$50 more than a multiple of \$100 and, therefore, under the Board's rules rounded up to the nearest \$100. See PCAOB Rule 7103(a). For a more detailed discussion of the Board's analysis, see the proposing release.

²⁵ Pursuant to PCAOB Rule 7104(a), payment is due 30 days after the notice setting forth the allocated share of the accounting support fee to the issuer is sent. Under the Board's current rules, the "notice"

assigned share, then, with certain exceptions, no registered public accounting firm is permitted to sign an unqualified audit opinion with respect to that issuer's financial statements or to sign a consent to the use of prior audit opinions for that issuer. The same concept is being extended to brokers and dealers in that no registered public accounting firm is permitted to sign an audit report or a document, report, notice, or other record concerning procedures or controls for a broker or dealer if its share of the broker-dealer accounting support fee is past-due and no petition for correction has been filed. In addition, for issuers with one or more broker or dealer subsidiaries, if the share of the accounting support fee allocated either to the issuer or any of its broker or dealer subsidiaries is past due and no petition for correction has been filed with respect to that share, no registered public accounting firm may sign an audit report for that issuer.

As explained in the proposing release, to avoid unnecessarily preventing issuers from timely access to the capital markets, the funding rules contain a limited exception to this prohibition on the signing of audit reports and the issuance of consents. The exception was originally adopted because an issuer may have a past-due share of the accounting support fee at a time when, in order to access or preserve its ability to access the capital markets in a timely manner, the issuer needs to submit a report to, or make a filing with, the Commission and the issuer must include an auditor's opinion or consent in that report or filing. If circumstances cause an issuer to rely upon the exception, however, the funding rules have required the issuer to submit an electronic notice to the

referenced in Rule 7104(a) relates to the document sent by the Board setting forth an entity's share of the accounting support fee under Section 109 of the Sarbanes-Oxley Act and the Board's funding rules. The Board is adopting amendments to replace the term "notice" with "invoice" in its funding rules so as not to cause any confusion with the definition of "audit" and "audit report," which both now contain a reference to "notice."

Board no later than the next business day after the filing is made with the Commission.²⁶

The rule limits the use of the exception to a single 15 business day period beginning on the earlier of the date of the filing with the Commission or the date of the notice to the Board.

The Board is extending this exception so that it will be available when brokers and dealers, including brokers or dealers that are subsidiaries of issuers, have an outstanding past-due share of the accounting support fee. Under the rules, therefore, if the conditions of the rule are met, a registered public accounting firm may sign an unqualified audit opinion or provide a consent to the use of a previously issued audit report with respect to the financial statements of not only an issuer but also a broker or dealer even though the issuer, broker, dealer, or a broker or dealer subsidiary of an issuer, has outstanding a past-due share of the accounting support fee and has not filed a petition for correction. For example, if a broker subsidiary of an issuer has an outstanding past-due share of the broker-dealer accounting support fee, and the broker subsidiary needs an audit report in order to submit a report to, or make a filing with, the Commission, then, provided the specific conditions in Rule 7104(b) are met, the subsidiary's registered public accounting firm is permitted to sign an unqualified audit opinion with respect to that broker subsidiary's financial statements or issue a consent to include an audit report issued previously.

Under the terms of the rule, however, the exception may be invoked only once with respect to any share of the accounting support fee that a broker or dealer is assessed

²⁶ See PCAOB Release No. 2003-02, Amended SEC Filing Form 19b-4 (June 30, 2003). As discussed elsewhere in this release, the Board is amending this rule to require that the notice be filed by the registered public accounting firm instead of the issuer.

in a given year.²⁷ Accordingly, using the example above, the exception could not be invoked again with respect to the outstanding broker-dealer accounting support fee balance if the broker's issuer parent later needs an audit report in order to submit a report to, or make a filing with, the Commission. The outstanding broker-dealer accounting support fee balance would have to be paid before the issuer parent's registered public accounting firm signs an unqualified audit opinion or issues a consent to include an audit report issued previously with respect to that issuer's financial statements. After the broker-dealer accounting support fee is paid, however, the issuer parent could invoke the exception with respect to an outstanding, past-due share of the issuer's accounting support fee.

A note added to the funding rules states that for the purposes of the prohibition on signing unqualified audit reports for issuers, brokers, and dealers with past-due shares of the accounting support fee, the term "audit" means an examination of the financial statements, reports, documents, procedures, controls, and notices of any issuer, broker, or dealer by a registered accounting firm for the purpose of expressing an opinion on the financial statements or providing an audit report. "Audit report" in these circumstances means a document, report, notice, or other record prepared following an audit performed for purposes of compliance by an issuer, broker, or dealer with the requirements of the securities laws and in which the auditor either (i) sets forth an opinion of the firm regarding the financial statement, report, notice, or other document, procedures, or

²⁷ See PCAOB Rule 7104(b), which states "[t]his exception to paragraph (b)(1) of this Rule . . . may not be invoked for more than one such period with respect to any share of the accounting support fee that the issuer, broker, or dealer is assessed under Rule 7103."

controls, or (ii) asserts that no such opinion can be expressed.²⁸ These are the same definitions found in new Section 110 of the Sarbanes-Oxley Act. These definitions recognize that auditors today not only examine entities' financial statements but, for larger issuers, auditors also examine internal control over financial reporting, and, for brokers and dealers, auditors further issue mandated reports under Rule 17a-5 and other applicable regulations.

In addition, consistent with the provisions in the funding rules applicable to issuers, the revised funding rules provide that if the Board does not receive payment within 30 days of a broker or dealer being notified of its share of the accounting support fee, the payment will be deemed past due and interest will accrue at a rate of 6% per year. If payment is not received by the 90th day after the original notice was sent, the Board may report the nonpayment to the Commission or the broker's or dealer's designated examining authority, which may pursue appropriate disciplinary action in accordance with its rules.²⁹ Section 109(h)(1) of the Sarbanes-Oxley Act, as amended by the Dodd-Frank Act, provides that "[e]ach broker or dealer shall pay to the Board the annual accounting support fee allocated to such broker or dealer under this section."

E. Public Comment Process and Board Responses

In response to the proposed rules, the Board received three comment letters that addressed establishing classes of brokers and dealers and allocating the broker-dealer accounting support fee. Commenters supported these rules and, in particular, the

²⁸ In connection with other rulemaking projects, the Board may consider amending its rules to apply more broadly the definitions of "audit" and "audit report" in Section 110 of the Sarbanes-Oxley Act. If such rulemaking occurs, the Board may revisit the need for this Note in the funding rules.

²⁹ For issuers, nonpayment of PCAOB accounting support fee would continue to be a violation of Section 13(b)(2)(C) of the Exchange Act.

proposal to have portions of the fee paid only by brokers and dealers with at least \$5 million in tentative net capital.³⁰

Additional commenters raised issues regarding re-designated Rule 7104(b), Determination of Payment of Accounting Support Fees by Registered Accounting Firm. This rule is designed to encourage payment of the accounting support by issuers, brokers, and dealers by prohibiting auditors from signing certain audit opinions and consents to the use of prior opinions unless the appropriate fee has been paid to the PCAOB. An exception to this prohibition, however, is available under specific circumstances. If under the circumstances described in Rule 7104(b) a registered public accounting firm signs an unqualified audit opinion or issues a consent to include an audit report issued previously, that firm must submit a notice to the Board that it and the issuer, broker, or dealer are relying on the exception.³¹ The commenters questioned whether the rule is necessary, opposed shifting the requirement to submit the notice from the issuer (or broker or dealer)³² to the auditor,³³ and one commenter requested that Note 1 to this rule include the word “solely” to indicate that an auditor may determine that the fee has been paid solely by obtaining a representation from management to that effect.³⁴

³⁰ Letters from the National Association of Independent Broker Dealers, Terminus Securities LLC, and the California Society of Certified Public Accountants.

³¹ See PCAOB Release No. 2003-02, Amended SEC Filing Form 19b-4 (June 30, 2003). As discussed elsewhere in this release, the Board is amending this rule to require that the notice be filed by the registered public accounting firm instead of the issuer.

³² The original PCAOB rule applied only to issuers. The amended rule applies to issuers, brokers, and dealers.

³³ See the letters from the Center for Audit Quality; Deloitte & Touche LLP; KPMG LLP; McGladrey & Pullen, LLP; and PricewaterhouseCoopers LLP.

³⁴ See the letter from Deloitte & Touche LLP.

The Board adopted the predecessor to new Rule 7104(b) in 2003 as part of the original funding rules. As stated in the adopting release for the funding rules in 2003, the collection measures in the rules are intended to ensure the reliability of the independent funding source the Sarbanes-Oxley Act provides for the Board and to promote fairness to all entities allocated a share of the accounting support fee.³⁵ This rule may be part of the reason collection of the accounting support fee has worked as intended and the Board has experienced a high collection rate of the accounting support fee. Accordingly, subject to Commission approval, the rule will continue to be part of the Board's funding rules.

Some commenters opposed shifting to auditors the requirement to submit a notice to the Board that the exception in Rule 7104(b) has been used and that an auditor opinion or consent has been signed and filed with the Commission despite non-payment of the accounting support fee. These commenters indicated that the issuer, and potentially the broker or dealer, should make this submission because (1) it is the issuer (or broker or dealer) that is delinquent with its share of the fee, (2) it is the issuer (or broker or dealer) that is filing its documents with the Commission, and (3) a process already has been established with issuers under the existing rule.³⁶ One commenter noted statements in the proposing release expressing that it is the issuer's circumstances that cause the use of the exception and that submission of the notice is not a condition for reliance on the exception and does not affect the validity of the auditor's opinion or consent. The

³⁵ See Board Funding: Establishment of Accounting Support Fee, PCAOB Release No. 2003-003 (April 18, 2003).

³⁶ See the letters from the Center for Audit Quality; Deloitte & Touche LLP; KPMG LLP; McGladrey & Pullen, LLP; and PricewaterhouseCoopers LLP.

commenter indicated that given those statements, it is not appropriate to shift the burden for the notice to the auditor.³⁷

Shifting the responsibility to the auditor to make the submission, however, better aligns the rule with the Board's general oversight authority over registered public accounting firms. Furthermore, over the past eight years, the Board has received only a few notices under this rule. A cursory review of SEC filings by issuers with outstanding accounting support fee balances, however, provides anecdotal evidence that more notices should have been filed. Such omissions to file might be due to issuers being relatively unfamiliar with PCAOB rules or unaware of the potential consequences of not complying with a PCAOB rule. Auditors should be more familiar with the Board's rules. Also, placing the obligation on auditors to file such notices may make application of the rule more readily subject to the Board's review. Accordingly, the rule is being adopted as proposed.

Finally, one commenter asked that the word "solely" be added to Note 1 to proposed Rule 7104(b) in order to make clear that to satisfy the obligation to determine that the fee has been paid by the issuer, broker, or dealer, the auditor only has to receive a management representation to that effect.³⁸ While the Board has said that it is sufficient if an auditor determines an issuer's payment of the accounting support fee by obtaining a management representation of payment,³⁹ auditors also may determine such payments through other means. For example, an auditor also may determine an issuer's payment of

³⁷ See the letter from McGladrey & Pullen, LLP.

³⁸ See the letter from Deloitte & Touche LLP.

³⁹ See Question 26 of the Frequently Asked Questions – The Accounting Support Fee and the Funding Process, dated April 22, 2011. The Frequently Asked Questions are located at <http://pcaobus.org/About/Ops/Pages/SupportFeeFAQ.aspx>.

the accounting support fee by checking the “List of Issuers with No Outstanding Past-Due Share of the Accounting Support Fee” that is posted on the Board’s website.⁴⁰

Adding the word “solely” to the Note could result in some firms mistakenly believing that the Board prefers management representations over other equivalent means of determining such payments. The rule, therefore, is being adopted as proposed.

Issuers

The Board also is adopting amendments to its existing rules for the allocation, assessment, and collection of the issuer accounting support fee. The amendments to the issuer funding rules are effective, subject to approval by the Commission, for the allocation, assessment, and collection of the 2012 accounting support fee for issuers.⁴¹

A. Definitions of Market Capitalization and Common Equity

The Board’s rules historically have defined the terms “issuer market capitalization” and “market capitalization of an issuer” to be the aggregate market value of all classes of an issuer’s common stock that trade in the United States. Determining an issuer’s market capitalization based on its outstanding common stock, however, has led to interpretive issues, such as whether an entity’s “common stock” includes limited partnership units or interests, securities convertible into common stock, rights or options to purchase common stock, and other categories of securities.

To reduce issues regarding the meaning of “common stock” in the Board’s rules, the Board is amending the definition of “issuer market capitalization” and “market capitalization of an issuer” to replace the reference to “common stock” with a reference to “voting and non-voting common equity.” As amended, references in the Board’s rules

⁴⁰ The list is located at http://pcaobus.org/About/Ops/Documents/Support%20Fee/Issuers_Paid.pdf.

⁴¹ The Board’s allocation, assessment, and collection of the accounting support fee for issuers typically takes place during the first half of the Board’s fiscal year.

to an issuer's "market capitalization" are to the issuer's aggregate market value of all classes of voting and non-voting common equity traded in the United States.⁴²

The definition of "common equity" being adopted by the Board tracks the definition in Rule 12b-2 under the Exchange Act. As applied by the Board for funding purposes, the amount of common equity considered in deriving an issuer's market capitalization is based on any class of common stock or equivalent interest, any beneficial interest in a trust or a limited partnership interest, and any other security that the Commission, by rule, deems to treat as common equity.

B. Classes of Issuers

The Board also is adopting amendments to the descriptions of the existing classes of issuers. The funding rules adopted by the Board in 2003 identified four classes of issuers: (1) equity issuers whose average, monthly market capitalization during the preceding calendar year is greater than \$25 million, (2) investment company issuers (and entities that have elected to be regulated as business development companies) whose average, monthly market capitalization during the preceding calendar year is greater than \$250 million, (3) issuers that, as of the date the accounting support fee is calculated (i) do not have to file financial statements pursuant to Commission rule or other action of the staff of the Commission, (ii) are employee stock purchase, savings, and similar plans, or (iii) are subject to the jurisdiction of a bankruptcy court and satisfy the modified reporting requirements of Commission Staff Legal Bulletin No. 2 ("SLB No. 2"), and (4) all other issuers.

The Board is amending the description of the classes of issuers in two significant ways. First, the Board is raising the average, monthly market capitalization threshold for

⁴² See PCAOB Rule 1001(i)(i)(1).

the first two classes of issuers. Second, the Board is changing the description of issuers that are subject to the jurisdiction of a bankruptcy court and satisfy the modified reporting requirements of SLB No. 2.

1. Change in Average, Monthly Market Capitalization Threshold

The Board is adopting amendments that raise the average, monthly market capitalization threshold during the preceding calendar year for the first class of issuers from \$25 million to \$75 million. Equity issuers with a market capitalization between \$25 million and \$75 million, therefore, are moving from the first class to the fourth class and will be allocated a share of the accounting support fee equal to zero. The Board notes that the aggregate issuer accounting support fee collected from equity issuers with average, monthly market capitalizations between \$25 million and \$75 million during the past seven years has been a relatively small part (less than 0.4%) of the Board's total accounting support fee from equity issuers.⁴³ At the same time, approximately 1,100 equity issuers, representing approximately 22.6% of all equity issuers assessed a fee in 2010, have average, monthly market capitalization within that range.⁴⁴ In addition, not allocating a share of the issuer accounting support fee to these issuers appears to have a negligible effect on the amounts allocated to other issuers.

⁴³ The Board's use and calculation of \$75 million in market capitalization for funding purposes should not be confused with the criteria to determine whether an issuer is deemed an "accelerated filer," as defined by Rule 12b-2 under the Exchange Act. Under that rule, an issuer is an accelerated filer if, among other things, it has an aggregate worldwide market value of the voting and non-voting common equity held by non-affiliates (i.e., public float) of \$75 million or more as of the end of the entity's second quarter. See Release No. 33-8128 (September 5, 2002).

⁴⁴ The aggregate FASB accounting support fee collected on behalf of FASB from equity issuers with average, monthly market capitalizations between \$25 million and \$75 million for the 2010 accounting support fee was a relatively small part (less than 0.4%) of the FASB accounting support fee from equity issuers despite the fact that approximately 1,100 equity issuers, representing approximately 22.6% of all equity issuers assessed a fee, have average, monthly market capitalization within that range.

The Board similarly is raising the average, monthly market capitalization threshold for the second class of issuers consisting of investment company issuers (and business development companies) currently subject to allocation of the support fee from \$250 million to \$500 million.⁴⁵ Investment companies (including business development companies) with average, monthly market capitalizations between \$250 million and \$500 million, therefore, are moving from the second class to the fourth class and will be allocated a share of the accounting support fee equal to zero. The Board notes that the aggregate fees collected from investment company issuers (including business development companies) with average, monthly market capitalizations between \$250 million and \$500 million during the past seven years have been a relatively small part (approximately 5.1%) of the Board's total accounting support fee from investment companies.⁴⁶ At the same time, approximately 1,450 investment companies, representing approximately 33.4% of all investment companies assessed a share of the issuer accounting support fee in 2010, have average, monthly market capitalization within that

⁴⁵ Under the Board's original funding rules, market capitalization for an investment company issuer whose shares are not traded on a national exchange or quoted on NASDAQ was the investment company's net asset value. As noted in the proposing release, since the Board's adoption of its funding rules in 2003, NASDAQ Stock Market LLC has become a national securities exchange under Commission rules. In light of this change, the Board proposed to revise PCAOB Rule 1001(i)(i)(2) by replacing the reference to NASDAQ with a reference to the "OTC Bulletin Board." After further consideration, however, the Board does not believe the proposed reference in the rule to the "OTC Bulletin Board" is necessary and believes it is preferable for its rules not to refer to any particular market that is currently in operation. Accordingly, PCAOB Rule 1001(i)(i)(2) is being amended to replace the phrase "quoted on NASDAQ" with the phrase "whose share price is not otherwise publicly available." This is consistent with the current requirement contained in Rule 7101(a)(2), which references the public availability of the share price in describing investment company issuers eligible to be assessed a share of the issuer accounting support fee. Therefore, starting in 2012, the market capitalization for an issuer that is an investment company whose shares are not traded on a national exchange or whose share price is not otherwise publically available, will be the investment company's net asset value.

⁴⁶ Approximately 7.9% of the 2010 accounting support fee was allocated to investment companies. Under the Board's funding rules, when allocating the issuer accounting support fee to investment companies, 10% of the investment company issuer's actual average monthly market capitalization or net asset value is used in the calculation. Accordingly, the amount of the issuer accounting support fee allocated to investment companies over the past seven years has represented a relatively small portion (average of approximately 6.2%) of the total issuer accounting support fee assessed.

range.⁴⁷ In addition, as discussed below, not allocating a share of the issuer accounting support fee to these investment companies appears to have a negligible effect on the amounts allocated to other investment companies.

Raising the threshold for the first class of issuers from \$25 million in average, monthly market capitalization to \$75 million and raising the threshold for the second class of issuers from \$250 million in average, monthly market capitalization to \$500 million should have a negligible effect on the amounts allocated to issuers under Section 109 of the Sarbanes-Oxley Act.⁴⁸

Generally, equity issuers with average, monthly market capitalization of approximately \$600 million or greater are likely to see an increase in their allocated share of the issuer accounting support fee.⁴⁹ Each entity's allocated share of the fee increases, however, by approximately 1% or less. For investment company issuers, on average, the allocated share of the accounting support fee increases for entities with average, monthly market capitalization of approximately \$4 billion or greater, with the entity's allocated share of the fee increasing by approximately 2% or less.⁵⁰ Accordingly, the amendments

⁴⁷ The aggregate fees collected on behalf of FASB from investment company issuers (including business development companies) with average, monthly market capitalizations between \$250 million and \$500 million for the 2010 accounting support fee was a relatively small part (approximately 5.3%) of the FASB accounting support fee from investment companies despite the fact that approximately 1,450 investment companies, representing approximately 33.4% of all investment companies assessed a share of the FASB accounting support fee in 2010, have average, monthly market capitalization within that range.

⁴⁸ The changes to the thresholds for the first and second classes of issuers are also applicable to the allocation of the FASB accounting support fee, which pursuant to Section 109(e) of the Sarbanes-Oxley Act is allocated among issuers only.

⁴⁹ The allocated share of the issuer accounting support fee for 465 out of 1,190 equity issuers with average, monthly market capitalization between \$75 million and \$600 million may increase by \$100 because the additional allocated amount could result in the unrounded allocated share being \$50 more than a multiple of \$100 and, therefore, under the Board's rules, rounded up to the nearest \$100. See PCAOB Rule 7103(a).

⁵⁰ The allocated share of the issuer accounting support fee for 327 out of 2,367 investment companies with average, monthly market capitalization between \$500 million and \$4 billion may increase by \$100 because the additional allocated amount could result in the unrounded allocated share being \$50 more than a multiple of \$100 and, therefore, under the Board's rules rounded up to the nearest \$100. See PCAOB Rule 7103(a).

to the average, monthly market capitalization for class one and two issuers should not result in a significant increase in any issuer's assessed share of the accounting support fee.⁵¹ The Board has reviewed the impact of increasing the threshold for equity company issuers and investment company issuers using the information from the allocation, assessment, and collection of the 2011 accounting support fee for issuers and noted no significant differences with amounts reviewed during the proposal phase of this project.

2. Modified Reporting Requirements of SLB No. 2

The Board also is amending the description of the class of issuers that are not assessed a share of the accounting support fee because they are in bankruptcy. As noted above, under the Board's funding rules adopted in 2003, issuers that are under the jurisdiction of a bankruptcy court and "satisfy the modified reporting requirements of Commission Staff Legal Bulletin No. 2" are in the third class and are assigned a share of the accounting support fee equal to zero.⁵²

SLB No. 2 states that an issuer under the jurisdiction of a bankruptcy court may request that the Commission's Division of Corporation Finance ("Division") provide a "no-action" letter indicating that the Division will not recommend enforcement action if the issuer files with the Commission modified reports in lieu of the reports required under the Exchange Act. SLB No. 2 describes the information and assertions that should be in a request for a "no-action" letter, including information related to the issuer's financial condition, prior compliance with Exchange Act filing requirements, the timing of the

⁵¹ For a detailed discussion of the Board's analysis, see the proposing release.

⁵² SEC Staff Legal Bulletin No. 2 (CF) (April 15, 1997), available at <http://sec.gov/interps/legal/slbcf2.txt>, reflects the views of the Commission's Division of Corporation Finance that companies under the jurisdiction of a bankruptcy court are not relieved of their reporting obligations under the securities laws but, upon the satisfaction of certain conditions, may file reports that "differ in form or content" from the reports required under the Exchange Act.

announcement by the issuer of its bankruptcy filing, the issuer's ability to continue to file Exchange Act reports, and a description of the current market for and trading in the issuer's securities.⁵³

Although acceptance of modified reports is at the discretion of the Commission staff, there is no requirement in SLB No. 2 or elsewhere that an issuer in bankruptcy ask the Division for a "no-action" letter prior to filing modified reports. Such "no-action" requests are voluntary. An issuer in bankruptcy may choose to file modified reports without providing the Division with the information and assertions in SLB No. 2.⁵⁴ Because the Board's funding rules, however, are based on whether an issuer has "satisf[ied] the modified reporting requirements" of SLB No. 2, when the issuer has not requested or not received a "no-action" letter from the Division, the PCAOB staff has been placed in the position of having to evaluate available public information to determine whether the conditions in SLB No. 2 are satisfied. To address such situations, PCAOB staff generally has requested that issuers provide an analysis demonstrating its compliance with the conditions set forth in SLB No. 2 and/or an opinion of counsel that the issuer meets the conditions set forth in SLB No. 2.⁵⁵

The Board is amending its rules to require that in order to be assigned a share of the accounting support fee equal to zero, an issuer that is subject to the jurisdiction of a bankruptcy court and asserts that it falls within the third class of issuers provide an opinion of counsel that the issuer satisfied the modified reporting requirements of

⁵³ Id.

⁵⁴ The Commission may deem such a filing to be deficient and not to satisfy the issuer's obligations under the Exchange Act and Commission rules and forms.

⁵⁵ See Question 15 of the Frequently Asked Questions – The Accounting Support Fee and the Funding Process, dated April 22, 2011. The Frequently Asked Questions are located at <http://pcaobus.org/About/Ops/Pages/SupportFeeFAQ.aspx>.

Commission Staff Legal Bulletin No. 2 as of the date that the issuer accounting support fee is calculated. This amendment is consistent with the staff's past practices as noted above. The impact of this amendment is believed to be negligible on the amounts allocated and assessed to issuers under Section 109 of the Sarbanes-Oxley Act.⁵⁶

C. Public Comment Process and Board Responses

One commenter supported the Board's proposals to amend the basis for calculating the issuer's market capitalization to include the market capitalization of all classes of an issuer's voting and non-voting common equity and to increase the average monthly market capitalization thresholds in the funding rules for classes of equity issuers and investment companies.⁵⁷ The Board did not receive any comments on the proposed description of the class of issuers that are not assessed a share of the accounting support fee because they are in bankruptcy.

As noted above, additional commenters raised issues regarding re-designated Rule 7104(b), Determination of Payment of Accounting Support Fees by Registered Accounting Firm. This rule is designed to encourage payment of the accounting support fee by issuers, brokers, and dealers by prohibiting auditors from signing certain audit opinions and consents to the use of prior opinions unless the appropriate fee has been paid to the PCAOB. An exception to this prohibition, however, is available under specific circumstances and conditions, including the submission of a notice to the Board that the auditor and the issuer, broker or dealer are relying on the exception.⁵⁸ The

⁵⁶ For the 2008-2010 accounting support fees, 26 equity issuers that were allocated a share of the accounting support fee had filed for bankruptcy.

⁵⁷ See the letter from the California Society of Certified Public Accountants.

⁵⁸ See PCAOB Release No. 2003-02, Amended SEC Filing Form 19b-4 (June 30, 2003). As discussed elsewhere in this release, the Board is amending this rule to require that the notice be filed by the registered public accounting firm instead of the issuer.

commenters questioned whether the rule is necessary, opposed shifting the requirement to submit the notice from the issuer (or broker or dealer)⁵⁹ to the auditor,⁶⁰ and one commenter requested that Note 1 to this rule include the word “solely” to indicate that an auditor may determine that the fee has been paid solely by obtaining a representation from management to that effect.⁶¹ For the reasons discussed above, the rule is being adopted as proposed.

Other amendments to the Board’s Funding Rules

The Board also is adopting certain technical changes to its funding rules. The most significant of these changes are listed below.

- Rule 7100 – The Board is making certain changes to Rule 7100 to reflect that the Board establishes a total accounting support fee each year as part of its budget process.⁶² In addition, the amendment to Rule 7100 reflects the Board’s obligation under Section 109 of the Sarbanes-Oxley Act to equitably allocate the total accounting support fee between issuers, as a group, and brokers and dealers, as a group.
- Notes to Rule 7101 – The Board is adopting technical changes to the notes to Rules 7101(a)(1) and (2) to clarify how an entity’s monthly market

⁵⁹ The original PCAOB rule applied only to issuers. The amended rule applies to issuers, brokers, and dealers.

⁶⁰ See the letters from the Center for Audit Quality; Deloitte & Touche LLP; KPMG LLP; McGladrey & Pullen, LLP; and PricewaterhouseCoopers LLP.

⁶¹ See the letter from Deloitte & Touche LLP.

⁶² The PCAOB Budget is approved by the Board in the preceding calendar year and must be approved by the Commission. PCAOB Rule 7101(a) refers to the date the issuer accounting supporting fee is calculated. This date is referred to as the “calculation date.” As discussed in Question 4 of the Frequently Asked Questions – The Accounting Support Fee and the Funding Process, the issuer calculation date represents the date as of which the allocation of the issuer accounting support fee is determined for equity issuers and investment company issuers. The Frequently Asked Questions are located at <http://pcaobus.org/About/Ops/Pages/SupportFeeFAQ.aspx>. See also Rule 7102(a), as amended, which contains a similar reference to the date the broker-dealer accounting support fee is calculated. Under the amendments to the funding rules, this date is referred to as the “broker-dealer calculation date.”

capitalization is calculated and that such calculation includes market capitalization information for all classes of the issuer's voting and non-voting common equity, consistent with the amendments to the definition of "issuer market capitalization" discussed above.

- Rule 7103(c) – The Board is extending the time frame within which any issuer, broker, or dealer may petition the Board for correction of the class in which it has been placed or its allocated share of the accounting support fee. Under the amended rules, an issuer, broker, or dealer would have 60 days, rather than 30 days, after an invoice is sent to submit a petition for correction. In addition, the Board is codifying its existing practice of considering petitions received after the deadline when there is good cause to do so.⁶³
- Rule 7104(b) – The Board is adopting amendments to replace the word "Confirmation" with "Determination" in the caption for Rule 7104(b) and to delete the reference in Note 1 to the rule to obtaining a confirmation from the Board that no past due share of the accounting support fee is outstanding. This amendment clarifies that registered public accounting firms are not required to confirm with the Board whether an issuer broker, or dealer has any outstanding past due share of the accounting support fee prior to signing an unqualified audit opinion, consenting to including an audit report issued previously, or signing a document, report, notice, or other record concerning procedures or controls of any issuer, broker, or dealer required under the securities laws. Confirmation with the Board is one of a number of

⁶³ See Question 6 in the Frequently Asked Questions – The Accounting Support Fee and the Funding Process. The Frequently Asked Questions are located at <http://pcaobus.org/About/Ops/Pages/SupportFeeFAQ.aspx>.

procedures that a registered public accounting firm may use in determining whether an issuer, broker, or dealer has any outstanding past-due share of the accounting support fee.⁶⁴

The Board did not receive any comments on these technical amendments,⁶⁵ and they are being adopted as proposed.

Effective Date

Pursuant to Section 109(d)(3) of the Sarbanes-Oxley Act, as amended by the Dodd-Frank Act, the PCAOB is required to begin the allocation, assessment, and collection of the accounting support fee from brokers and dealers to fund the first full fiscal year beginning after the date of the enactment of the Dodd-Frank Act, which is the Board's 2011 fiscal year. Accordingly, the amendments to the Board's funding rules are effective, subject to approval by the SEC, for the allocation, assessment, and collection of the 2011 broker-dealer accounting support fee for brokers and dealers and its 2012 issuer accounting support fee for issuers.

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate 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 or disapprove such proposed rule; or

⁶⁴ See Questions 22-26 in the Frequently Asked Questions – The Accounting Support Fee and the Funding Process. The Frequently Asked Questions are located at <http://pcaobus.org/About/Ops/Pages/SupportFeeFAQ.aspx>.

⁶⁵ As noted above, commenters raised issues with respect to other aspects of Rule 7104(b), including the procedures an auditor may use to determine whether an issuer, broker, or dealer has an outstanding past-due share of the accounting support fee.

(b) institute proceedings to determine whether the proposed rule 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 rules are consistent with the requirements of Title I of the Sarbanes-Oxley Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/pcaob.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number PCAOB-2011-02 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number PCAOB-2011-02. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site

(<http://www.sec.gov/rules/pcaob.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes 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, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the PCAOB. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. PCAOB-2011-02 and should be submitted on or before [insert 21 days from publication in the Federal Register].

For the Commission, by the Office of the Chief Accountant, pursuant to delegated authority.

Elizabeth M. Murphy
Secretary