

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 available<sup>6</sup> 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.<sup>7</sup> (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.<sup>8</sup> (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.<sup>9</sup> (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)).<sup>10</sup> (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.<sup>11</sup>

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

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.<sup>13</sup> 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.<sup>14</sup>

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

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> 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.

<sup>10</sup> Rule 7101(a)(4).

<sup>11</sup> Rule 7101(b)(1).

<sup>12</sup> Rule 7101(b)(2).

<sup>13</sup> 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.

<sup>14</sup> Rule 7103(a).