

designates the PCAOB as the collection agent for that body's support fee then the PCAOB's collection and assessment rules (PCAOB proposed rules 7102 and 7103) would apply to that accounting standard setting body's support fee. Proposed rule 7104 states that the PCAOB, however, would not be responsible for calculating the standard setting body's support fee or the allocation of such fee among issuers.

III. Discussion of Comment Letters

The Commission received five comment letters regarding the PCAOB's proposed rules on the support fee. One letter was from the Investment Company Institute, one letter was from a financial services company,¹² one was from the Federation of German Industries, and two letters were from accounting firms.¹³

The Investment Company Institute ("ICI") expressed concern that the funding rules would cause issuers of variable insurance contracts to pay twice the amount of support fees charged to other types of investment companies. Variable contracts are typically issued by an investment company that invests its assets in one or more other underlying investment companies, and the ICI noted that, under the proposed rules, both the variable contract issuer and the underlying investment company would pay a support fee.¹⁴ While we appreciate the ICI's concerns, we note that the financial statements of both investment companies must be audited, and that the PCAOB would oversee both audits. Further, we note that under the proposed rules investment companies already are assessed at a lower rate than other issuers. Accordingly, we believe that the PCAOB rule is reasonable in this regard.

The ICI also requests additional advice on how the rules apply to "master-feeder fund arrangements" where feeder funds sell shares to the

public and then use the proceeds to purchase shares of a master fund, which are offered in private placements. We encourage the PCAOB to consider whether additional guidance is appropriate.

The Federation of German Industries noted, among other things, that many foreign private issuers are not required to disclose the number of shares outstanding in the United States in their periodic reports filed with the Commission but that such information should be available from applicable stock exchanges in the United States.¹⁵

The comment letters from the accounting firms noted concerns and requested guidance regarding, among other things, PCAOB proposed rule 7103(b), which provides that auditors may not sign an unqualified audit opinion with respect to an issuer's financial statements, or issue a consent to the use of a previously issued audit opinion, unless the registered public accounting firm has ascertained that the issuer either has no outstanding past-due share of the accounting support fee or has a pending petition for correction of the fee.

One accounting firm also indicated that proposed rule 7103(b) was unnecessary given other incentives on issuers to pay the fee, was counter to the policy of encouraging the issuance of timely audit reports, was inappropriate in that the PCAOB was in a better position than the auditor to ascertain if payment had been made, and placed an inappropriate burden on auditors.¹⁶ We observe, however, that a Note to proposed rule 7103 states that auditors may ascertain that no past-due fee is outstanding by obtaining a representation from the issuer or a confirmation from the PCAOB. Auditors routinely obtain representations from management and seek confirmations from outside sources as part of their audit processes. Further, because the limitation in proposed rule 7103 pertains only to the issuance of unqualified audit opinions and consents, the rule would not prevent an auditor from signing a qualified or adverse audit opinion regardless of whether the issuer has paid its portion of the support fee.¹⁷ As discussed

below, the PCAOB has adopted an amendment to this provision.

IV. Accelerated Approval of Amendment No. 1; Solicitation of Comments

Amendment No. 1 to the proposed rule change would provide that the auditor of an issuer's financial statements may sign an unqualified audit opinion with respect to the issuer's financial statements, or issue a consent to the use of previously issued auditor opinions, even if the issuer has outstanding a past-due share of the accounting support fee and has not filed a petition for correction of that fee, if the issuer needs the auditor opinion or consent in order to submit a report to, or make a filing with, the Commission. Under the amendment, the issuer would submit to the PCAOB a notice of the signing of the audit opinion or issuance of the consent not later than one business day after the related filing is made with the Commission. This exception would not continue longer than 15 business days after the earlier of the submission of the notice to the PCAOB or the filing of the report or registration statement with the Commission, and may not be invoked for more than one such 15-business day period with respect to any share of the accounting support fee that the issuer is assessed under rule 7102.

We find good cause to approve Amendment No. 1 to the proposed rule prior to the thirtieth day after the date of publication of notice of filing Amendment No. 1 in the **Federal Register**. The original proposed rules, as noted above, were published in the **Federal Register**. We believe that Amendment No. 1 refines the rules and facilitates capital formation by assuring that an issuer, due to the inability to obtain an unqualified audit report or auditor consent, would not be denied access to the capital markets due to an inadvertent issue with respect to payment of the support fee. Amendment No. 1 also clarifies the obligations of auditors when an issuer or the auditor, upon the eve of a report or registration statement being filed with the Commission, becomes aware that the issuer has not paid or sought correction of a support fee. Amendment No. 1 does not contain major modifications from the scope and purpose of the rules as originally proposed, and was developed from the original proposal. We believe, moreover, that approving Amendment No. 1 will provide greater clarity and facilitate capital formation, thus furthering the public interest and the investor protection goals of the Act and of the securities laws. Finally, we also

accounting standard setting body under section 108. See Financial Reporting Release No. 70 (April 25, 2003) (68 FR 23333 (May 1, 2003)). The Financial Accounting Foundation ("FAF"), which is the board of trustees that provides administrative and operational functions for the FASB in accordance with section 19(b)(1)(A)(ii) of the Securities Act of 1933, 15 U.S.C. 77s(b)(1)(A)(ii), has informed the Commission that it intends to appoint the PCAOB as its collection agent and to utilize the formula in PCAOB rule 7101 as the allocation to be used for the FASB support fee. See letter dated June 11, 2003 from Joseph S. LaGambina, Executive Vice President, FAF, addressed to Mr. Scott Taub, Deputy Chief Accountant.

¹² Letter from Nationwide Financial Services, Inc.

¹³ See letters from KPMG LLP and Deloitte & Touche LLP.

¹⁴ Nationwide Financial Services, Inc., expressed similar concerns.

¹⁵ The number of shares traded in the United States is a necessary component of the fee calculation under the PCAOB's proposed rules. See PCAOB rules 1001(i)(i) and 7101.

¹⁶ Letter from Deloitte & Touche LLP.

¹⁷ Under the PCAOB's proposed rules, an issuer may not delay publication of a qualified or adverse audit report simply by not paying its portion of the support fee.