

15A(b)(11) of the Act²² in that it is designed to produce fair and informative quotations, to prevent fictitious or misleading quotations and to promote orderly procedures for collecting, distributing, and publishing quotations.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,²³ that the proposed rule change (SR-NASD-98-51) is approved, as amended.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁴

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-40874; File No. SR-NASD-98-88]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Listing and Continued Listing Determinations

December 31, 1998.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 27, 1998, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its wholly-owned subsidiary, The Nasdaq Stock Market Inc. ("Nasdaq"), filed a proposed rule change with the Securities and Exchange Commission ("Commission") relating to issuer listing and continued listing determinations. The NASD amended this proposal on December 15, 1998.³ The proposed rule change, as amended, is described in Items I, II, and III below, which Items have been prepared by Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

²² 15 U.S.C. 78o-3(b)(11).

²³ 15 U.S.C. 78s(b)(2).

²⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Robert E. Aber, Senior Vice President and General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated December 15, 1998.

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

The Association is filing with the Commission a proposed rule change that would replace the existing Rule 4800 Series (Rules 4810 through 4890) with a new code of procedure for review of Nasdaq listing determinations. The proposal also would temporarily relocate the existing Rule 4800 Series, to the extent it relates to other grievances concerning the Association's automated systems, to the Rule 9700 Series.⁴ Below is the text of the proposed rule change. New language is *italicized* and deletions are [bracketed].

4480. Termination Procedure.

(a) Failure to maintain compliance with the provisions of Rules 4450, 4460, or 4470 will result in the termination of an issuer's designation unless an exception is granted as provided in [this] *the* Rule [4480] 4800 Series. Termination shall become effective in accordance with the terms of the notice by Nasdaq.

(b) [An issuer that is subject to termination of its designation may request a review by a Panel authorized to hear appeals. If a review is requested, the issuer is entitled to submit materials and arguments in connection with such review.

(c) The Panel may grant or deny continued designation on the basis of the written submission by the issuer and whatever other data it deems relevant.

(d) Determinations by the Panel may be appealed to the Nasdaq Listing and Hearing Review Committee by any aggrieved person. An appeal to the Nasdaq Listing and Hearing Review Committee shall not operate as a stay of the decision of the Panel unless the Nasdaq Listing and Hearing Review Committee in its discretion determines to grant such a stay.

(e) The Rule 4800 series sets forth procedures applicable to the review of the termination of an issuer's designation.

(f) An issuer may voluntarily terminate its designation upon written notice to Nasdaq.

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4530. Issuer Hearing Fee

Removed

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[4800] 9700. PROCEDURES ON GRIEVANCES CONCERNING THE AUTOMATED SYSTEMS

[4810] 9710. Purpose

The purpose of this Rule 9700 [4800] Series is to provide, where justified, redress for persons aggrieved by the operations of any automated quotation, execution, or communication system owned or operated by the Association, or any subsidiary thereof, and approved by the Commission, not

⁴ The Association intends this latter change as a temporary measure pending submission and approval of amendments to the Rule 9510 Series addressing these issues.

otherwise provided for by the Code of Procedure as set forth in the Rule 9000 Series [or], the Uniform Practice Code as set forth in the Rule 11000 Series, [and to provide procedures for the handling of qualification matters pursuant to The Nasdaq Stock Market Rules, as set forth in the Rule 4000 Series] or the Procedures for Review of Nasdaq Listing Determinations as set forth in the Rule 4800 Series.

[4820] 9720. Form of Application

No change

[4830] 9730. Request for Hearing

No change

[4840] 9740. Consideration of Applications

No change

[4850] 9750. Decision

No change

[4860] 9760. Review by the Nasdaq Listing and Hearing Review Council

No change

[4870] 9770. Findings of the Nasdaq Listing and Hearing Review Council on Review

No change

[4880] 9780. Discretionary Review by the Board

No change

[4890] 9790. Application to Commission for Review

Any decision not appealed under Rule 9760 [4860] or called for review under Rule 9760 [4860] or Rule 9780 [4880] shall become the final action of the Association upon expiration of the time allowed for appeal or call for review. In any case where a person feels aggrieved by any final action of the Association issued pursuant to Rule 9770 [4870] or Rule 9780 [4880], the person may make application for review to the Commission in accordance with the Act.

4800. PROCEDURES FOR REVIEW OF NASDAQ LISTING DETERMINATIONS

4810. Purpose and General Provisions

(a) *The purpose of this Rule 4800 Series is to provide procedures for the independent review of determinations of the Association that prohibit or limit the listing of an issuer's securities on the Nasdaq Stock Market based upon the Nasdaq Stock Market Rules, as set forth in the Rule 4000 Series. Securities of issuers that do not meet the quantitative or qualitative listing standards set forth in the Rule 4000 Series are subject to delisting from, or denial of initial inclusion on, The Nasdaq Stock Market.*

(b) *An issuer may file a written request for an extension of time to comply with any of the standards set forth in the Rule 4000 Series or an exception to those standards at any time during the pendency of a proceeding under the Rule 4800 Series. The Association may grant extensions or exceptions where it deems appropriate.*

(c) *At each level of a proceeding under the Rule 4800 Series, the Listing Qualifications Panel (as defined in Rule 4830). Nasdaq Listing and Hearing Review Council (the "Listing Council"), or the NASD Board of*

Governors (the "NASD Board"), as part of its respective review, may request additional information from the issuer. The issuer will be afforded an opportunity to address the significance of the information requested.

(d) At each level of a proceeding under the Rule 4800 Series, the Listing Qualifications Panel, Listing Council, or NASD Board, as part of its respective review, may consider the issuer's bid price, market makers or any information that the issuer releases to the public, including any additional quantitative deficiencies reflected in the released information.

(e) At each level of a proceeding under the Rule 4800 Series, the Listing Qualifications Panel, Listing Council, or NASD Board, as part of its respective review, may consider any failure to meet any quantitative standard or qualitative consideration set forth in the Rule 4000 Series, including failures previously not considered in the proceeding. The issuer will be afforded notice of such consideration and an opportunity to respond. In this regard, the issuer may be subject to additional or more stringent criteria for the initial or continued inclusion of particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued inclusion of the securities inadvisable or unwarranted in the opinion of the Association, even though the securities meet all enumerated criteria for initial or continued inclusion in The Nasdaq Stock Market.

4815. Written Notice of Staff Determination

If the Listing Qualification Department or the Listing Investigations Department reaches a determination (the "Staff Determination") to limit or prohibit the initial or continued listing of an issuer's securities, it will notify the issuer, describe the specific grounds for the determination, identify the quantitative standard or qualitative consideration set forth in the Rule 4000 Series that the issuer has failed to satisfy, and provide notice that upon request the issuer will be provided an opportunity for a hearing under this Rule 4800 Series.

4820. Request for Hearing

(a) An issuer may, within seven calendar days of the date of the Staff Determination, request either a written or oral hearing to review the Staff Determination. Requests for hearings should be filed with The Nasdaq Office of Listing Qualifications Hearings (the "Hearings Department"). A request for a hearing will stay the delisting action pending the issuance of a written determination by a Listing Qualifications Panel. If no hearing is requested within the seven calendar day period, the Staff Determination will take immediate effect. All hearings will be held before a Listing Qualifications Panel as described in Rule 4830. All hearings will be scheduled, to the extent practicable, within 45 days of the date that the request for hearing is filed, at a location determined by the Hearings Department. The Hearings Department will make an acknowledgment of the issuer's hearing request stating the date, time, and location of the hearing, and the deadline for written submissions to the Listing Qualifications Panel. The issuer will

be provided at least 10 calendar days notice of the hearing unless the issuer waives such notice.

(b) The issuer may file a written submission with the Hearings Department stating the specific grounds for the issuer's contention that the Staff Determination was in error or requesting an extension of time to comply with the listing requirements or an exception to those requirements, as permitted by Rule 4810. The issuer may also submit any documents or other written material in support of its request for review, including any information not available at the time of the Staff Determination.

(c) Within 15 calendar days of the date of the Staff Determination, but in no event after the time of the hearing, the issuer must submit a hearing fee to The Nasdaq Stock Market, Inc., to cover the cost of holding the hearing, as follows:

- (1) where consideration is on the basis of written submission from the issuer, \$1,400; or
- (2) where consideration is on the basis of an oral hearing, whether in person or by telephone, \$2,300.

4830. The Listing Qualification Panel

(a) All hearings will be conducted before an independent panel (the "Listing Qualifications Panel") composed of at least two persons, not employees of the NASD or its subsidiaries, designated by the Nasdaq Board of Directors. No person shall serve as a Listing Qualifications Panel member for a matter if his or her interest or the interests of any person in whom he or she is directly or indirectly interested will be substantially affected by the outcome of the matter.

(b) Prior to the hearing, the Listing Qualifications Panel will review the written record, as defined in Rule 4870. At the hearing, the issuer may make such presentation as it deems appropriate, including the appearance by its officers, directors, accountants, counsel, investment bankers, or other persons. Hearings are generally scheduled to last one hour, but may be extended at the discretion of the Listing Qualifications Panel. The Listing Qualifications Panel may question any representative of the issuer appearing at the hearing. A transcript of oral hearings will be kept. The record of proceedings before a Listing Qualifications Panel will be kept by the Hearings Department.

(c) After the hearing, the Listing Qualifications Panel will issue a written decision (the "Panel Decision") describing the specific grounds for the determination and identifying the quantitative standard or qualitative consideration set forth in the Rule 4000 Series that the issuer has failed to satisfy. The Panel Decision will be promptly provided to the issuer and is effective immediately unless it specifies to the contrary. The Panel Decision will provide notice that the issuer may request review of the Panel Decision by the Nasdaq Listing and Hearing Review Council within 15 calendar days of the date of the Panel Decision and that the Panel Decision may be called for review by the Nasdaq Listing and Hearing Review Council within 45 calendar days from the date of the Panel Decision pursuant to Rule 4840.

4840. Review by the Nasdaq Listing and Hearing Review Council

(a) The Nasdaq Listing and Hearing Review Council (the "Listing Council") is a committee appointed by the Nasdaq Board of Directors pursuant to Article V of the Nasdaq By-laws whose responsibilities include the consideration of determinations to limit or prohibit the listing of an issuer's securities.

(b) The issuer may initiate the Listing Council's review of any Panel Decision by making a written request within 15 calendar days of the date of the decision. Requests for review should be addressed to the Listing Council in care of the Nasdaq Office of General Counsel. The request will not operate as a stay of the Panel Decision. Also within 15 calendar days of the date of the Panel Decision, the issuer must submit a fee of \$1,400 to The Nasdaq Stock Market, Inc. to cover the cost of the review. Upon receipt of the request for review and the applicable fee, the Nasdaq Office of General Counsel will make an acknowledgment of the issuer's request stating the deadline for the issuer to provide any written submissions.

(c) The Listing Council may also consider any Panel Decision upon the request of one or more members of the Listing Council within 45 calendar days of the date of the Panel Decision. The issuer will be promptly informed of the reasons for the review and will be provided a deadline to provide a written submission if the issuer wishes. The institution of discretionary review by the Listing Council will not operate as a stay of the Panel Decision, unless the call for review specifies to the contrary. At the sole discretion of the Listing Council, the call for review of a Panel Decision may be withdrawn at any time prior to the issuance of a decision.

(d) The Listing Council will consider the written record and, at its discretion, hold additional hearings. Any hearing will be scheduled, to the extent practicable, within 45 days of the date that a request for review initiated by either the issuer or one or more members of the Listings Council, is made. The Listing Council may also recommend that the NASD Board of Governors ("NASD Board") consider the matter. The record of proceedings before the Listing Council will be kept by the Nasdaq Office of General Counsel.

(e) The Listing Council will issue a written decision (the "Listing Council Decision") that affirms, modifies, or reverses the Panel Decision or that refers the matter to Nasdaq staff or to the Listing Qualifications Panel for further consideration. The Listing Council Decision will describe the specific grounds for the decision, identify the quantitative standard or qualitative consideration set forth in the Rule 4000 Series that the issuer has failed to satisfy, and provide notice that the NASD Board may call the Listing Council Decision for review at any time before its next meeting which is at least 15 calendar days following the issuance of the Listing Council Decision. The Listing Council Decision will be promptly provided to the issuer and will take immediate effect unless it specifies to the contrary.

4850. Discretionary Review by NASD Board

(a) A Listing Council Decision may be called for review by the NASD Board solely upon the request of one or more Governors not later than the next NASD Board meeting that is 15 calendar days or more following the date of the Listing Council Decision. Such review will be undertaken solely at the discretion of the NASD Board. The institution of discretionary review by the NASD Board will not operate as a stay of the decision, unless the call for review specifies to the contrary.

(b) If the NASD Board conducts a discretionary review, the review generally will be based on the written record considered by the Listing Council. However, the NASD Board may, at its discretion, request and consider additional information from the issuer and/or from Nasdaq staff. Should the Board consider additional information, the record of proceedings before the NASD Board will be kept by the Nasdaq Office of General Counsel.

(c) If the NASD Board conducts a discretionary review, the issuer will be provided with a written decision describing the specific grounds for its decision, and identifying the quantitative standard or qualitative consideration set forth in the Rule 4000 Series that the issuer has failed to satisfy. The NASD Board may affirm, modify or revise the Listing Council Decision and may remand the matter to the Listing Council, Listing Qualifications Panel, or Nasdaq staff with appropriate instructions. This decision represents the final action of the Association and will take immediate effect unless it specifies to the contrary.

(d) If the NASD Board declines to conduct a discretionary review or withdraws its call for review, the issuer will be promptly provided with written notice that the Listing Council Decision represents the final action of the Association.

4860. Application to the Commission for Review

Any issuer aggrieved by a final action of the Association may make application for review to the Commission in accordance with Section 19 of the Act.

4870. Record on Review

(a) Documents in the written record may consist of the following items, as applicable: correspondence between Nasdaq and the issuer, the issuer's public filings, information released to the public by the issuer, and any written submissions or exhibits submitted by either the issuer or the Listing Qualifications Department or the Listing Investigations Department, including any written request for an extension or exception as permitted in Rule 4810(b) and any response thereto. Any additional information requested from the issuer by the Listing Qualifications Panel, Listing Council, or NASD Board as part of the review process will be included in the written record. The written record will be supplemented by the transcript of any hearings held during the review process and each decision issued. At each level of review under this Rule 4800 Series, the issuer will be provided with a list of documents in the written record, and a copy of any documents

included in the record that are not in the issuer's possession or control, at least three calendar days in advance of the deadline for issuer submissions, unless the issuer waives such production.

(b) In addition to the documents described in paragraph (a) above, if the issuer's bid price, market makers, or any information that the issuer releases to the public, is considered as permitted in Rule 4810, that information, and any written submission addressing the significance of that information, will be made part of the record.

(c) If additional issues arising under the Rule 4000 Series are considered, as permitted in Rule 4810, the notice of such consideration and any response to such notice will be made a part of the record.

4875. Document Retention Procedures

Any document submitted to the Association in connection with a Rule 4800 proceeding that is not made part of the record will be retained by the Association until the date upon which the Rule 4800 Series proceeding decision becomes final including, if applicable, upon conclusion of any review by the Commission or a federal court.

4880. Delivery of Documents

Delivery of any document under this Rule 4800 Series by an issuer or by the Association may be made by hand delivery to the designated address, or by facsimile to the designated facsimile number and overnight courier to the designated address. Delivery will be considered timely if hand delivered prior to the relevant deadline or upon being faxed and/or sent by overnight courier service prior to the relevant deadline. If an issuer has not specified a facsimile number or address, delivery will be made to the last known facsimile number and address. If an issuer is represented by counsel or a representative, delivery will be made to the counsel or representative.

4885. Computation of Time

In computing any period of time under the Rule 4800 Series, the day of the act, event, or default from which the period of time begins to run is not to be included. The last day of the period so computed is included, unless it is a Saturday, Sunday, federal holiday, or NASD holiday in which event the period runs until the end of the next day that is not a Saturday, Sunday, federal holiday or NASD holiday.

4890. Prohibited Communications

(a) Unless on notice and opportunity for the appropriate Nasdaq staff and the issuer to participate, a representative of the Association involved in reaching a Staff Determination, an issuer, or counsel to or representative of an issuer, shall not make or knowingly cause to be made a communication relevant to the merits of a proceeding under this Rule 4800 Series (a "Prohibited Communication") to any Listing Qualifications Panel member, Listing Council member, Governor of the NASD Board, or Association employee who is participating in or advising in the decision in that proceeding.

(b) Listing Qualifications Panel members, Listing Council members, Governors of the NASD Board and Association employees who are participating in or advising in the decision in a proceeding under this Rule 4800 Series, shall not make or knowingly cause to be made a Prohibited Communication to an issuer, counsel to or representative of an issuer, or a representative of the Association involved in reaching a Staff Determination.

(c) If a Prohibited Communication is made, received, or caused to be made, the Association will place a copy of it, or its substance if it is an oral communication, in the record of the proceeding. The Association will permit Nasdaq staff or the issuer, as applicable, to respond to the Prohibited Communication, and will place any response in the record of the proceeding.

(d) If the issuer submits a proposal to resolve matters at issue in a Rule 4800 Series proceeding, that submission will constitute a waiver of any claim that Association communications relating to the proposal were Prohibited Communications.

4330. Suspension or Termination of Inclusion of a Security and Exceptions to Inclusion Criteria

(a) No change.

(b) [Should Nasdaq] If the Association determines to suspend or terminate [that] a security's inclusion [shall be suspended or terminated] because of [its] noncompliance with the provisions of this Rule 4000 Series [4310 or Rule 4320 or by the operation of paragraph (a)(1), (2) or (3) of this Rule, Nasdaq], the Association will [shall so] notify the issuer prior to suspension or termination or as soon as practicable thereafter. This notification constitutes a Staff Determination for purposes of Rule 4815 and the issuer may request review of the decision under the Rule 4800 Series.

(c)-(f) No Change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

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

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**1. Purpose**

The NASD is proposing to replace its existing rules relating to listing matters.⁵

⁵ The Association's proposal temporarily relocates the existing Rule 4800 Series relating to

These changes follow changes made by the NASD in 1997 to the Rules of the Association relating to other grievances concerning the automated systems. Many of the procedures set forth in the proposed code of listings procedures ("Proposed Listings Code") are already used by Nasdaq in practice, and issuers are informed of these procedures in correspondence. The Proposed Listings Code codifies these procedures. In addition, it provides issuers with much greater detail about the review process and adds a number of procedures, including those for the maintenance of the record on review, procedures for the delivery of documents, and prohibitions on communications outside of the official proceeding.

Section 4810 of the Proposed Listings Code describes the purpose of the new Rule 4800 Series and certain general provisions. The proposed Rule 4800 Series applies only to decisions to prohibit or limit the listing of an issuer's securities on the Nasdaq.

The Proposed Listings Code provides that an issuer may request an extension of time to comply with any of the standards contained in the Rule 4000 Series or an exception to such standards. The granting of such an extension or exception is within the discretion of the NASD. During the review of a request for an extension or exception, the reviewing body will consider the original issue cited, but may also consider any additional issues, regardless of whether they were considered earlier in the proceeding. The Proposed Listings Code provides that the issuer will be notified of such consideration and given an opportunity to respond.

Proposed Rules 4815-4860 provide the general procedures that the Association and an issuer must follow with respect to any determination by the NASD to deny initial or continued listing to an issuer. Under proposed Rule 4815, Nasdaq staff in the Listing Qualifications Department or Listing Investigation Department will notify the issuer in writing of any decision to limit or prohibit the initial or continued listing of an issuer's securities. This notification will describe the specific grounds for the determination.

Proposed Rule 4820 provides that within 7 calendar days of receipt of this

other grievances concerning the Association's automated systems to the Rule 9700 Series. The NASD and NASD Regulation, Inc. plan to file changes to the Rule 9500 Series in the near term and, upon approval of those changes, the Rule 9700 Series will be deleted and non-listing related grievances and denials of access involving Nasdaq's automated systems will be reviewed through Rule 9500 Series procedures.

notification, the issuer may request a hearing for review of the determination.⁶ If an issuer requests a review, the staff determination will generally be stayed pending the outcome of the review.⁷ If no request for review is made, the determination will take effect after the time to request review has expired.

Proposed NASD Rule 4830 provides that all requests for review will be considered by an independent panel ("the Panel") composed of at least two persons, not employees of the NASD or its subsidiaries. The Nasdaq Board of Directors will designate potential panelists. Panelists may include both securities and non-securities professionals, such as NASD members, issuers, attorneys or accountants. The Panel hearing will, to the extent practicable, be scheduled within 45 days of the date that the request for hearing is filed. After the Panel hearing, the Panel will issue a written decision that is effective immediately (unless the decision itself provides otherwise).

Under proposed NASD Rule 4840, an issuer may request review of the Panel's decision within 15 days of the date the decision is issued. Such review is conducted by the Nasdaq Listing and Hearing Review Council ("Listing Council"). In addition, any member of the Listing Council may call a decision of the Panel for review within 45 days of the date of the issuance of that decision. Listing Council review of a matter generally does not stay the Panel decision (unless the call for review specifies otherwise). Given the heightened complexity of the procedure under the Proposed Listings Code and the additional resources that will be required as a result thereof, a fee of \$1,400 for review by the Listing Council is included in the Proposed Listings Code. This fee is designed to recoup the costs of processing the request for review, including preparing and copying the record on review for the

⁶The fee for such a review remains at its existing level of \$1,400 for a review based on written submission and \$2,300 for a review based on an oral presentation. The fee provisions have been relocated from Rule 4530 to Rule 4820(c).

⁷The Association is permitted, however, to suspend a security's inclusion in Nasdaq if the securities are not in compliance with the qualification requirements of NASD Rule 4310, or Rule 4320, or those requirements imposed by the NASD under NASD Rule 4330(a). In such event, Nasdaq will notify the issuer prior to the suspension or as soon as practicable thereafter. See NASD Rule 4330(b). Furthermore, Nasdaq may halt trading in a security pending the dissemination of material news or when Nasdaq requests information from an issuer relating to material news, qualification matters, or other information necessary to protect the public interest. See NASD Rule 4120(a)(5).

Review Council, staff resources within the Nasdaq Office of General Counsel for reviewing the record, advising the Review Council, preparing the decision, and a proportionate part of the expense of Review Council meetings. The fee is designed to be revenue neutral and to directly offset the costs associated with the Review Council's review. The Association believes that the fee is consistent with the fee currently charged for Panel review of a written record.⁸

The Listing Council will review matters based on the written record and will issue a decision to affirm, modify, or reverse the decision, or remand the matter to Nasdaq staff or to the Panel.⁹ This decision will be effective immediately, unless it specifies to the contrary. While these decisions remain subject to a call for review by the NASD Board of Governors, the ability to immediately issue a decision will allow the Council to act swiftly to delist a non-complaint issuer that is still trading on the Nasdaq Stock Market, or to permit an issuer who was wrongly delisted to return to the Nasdaq Stock Market more quickly. The Association believes that this ability will help it fulfill its directive to protect prospective investors.

Any member of the NASD Board may call a Listing Council decision for review at its next meeting that is 15 calendar days or more following the date of the Council decision. An issuer may not request that the NASD Board review the Council decision. If the NASD Board does not call a Council decision for review, the issuer will be notified that the Council decision represents the final action of the NASD. If the NASD Board does call a Council decision for review, the NASD Board will generally review the matter based on the record before the Listing Council. Ordinarily, the issuer will not be permitted to supplement the record on review.¹⁰ The NASD Board may affirm, modify, or reverse the Listing Council decision and may remand the matter to the Council, the Panel, or Nasdaq staff.

Proposed NASD Rule 4870 defines what is included in the record on review at each level of a Rule 4800 proceeding. At each level of review, the issuer will be provided a list of documents included in the record on

⁸This fee was approved by the Commission in Exchange Act Release No. 37088 (April 9, 1996), 61 FR 16662 (April 16, 1996).

⁹The Listing Council may, at its sole discretion, also hold additional hearings.

¹⁰The NASD Board may, at its sole discretion, request additional information from the issuer and/or from Nasdaq staff and may, at its sole discretion, hold additional hearings.

review. In addition, any subsequent public filings made by the issuer and any subsequent information released to the public by the issuer may be added to the record on review, as well as any subsequent correspondence between the Association and the issuer.

Furthermore, at any level of review, the deciding body may take note of the issuer's bid price and market makers at the time of consideration. The written record, as well as any documents excluded from the written record, will be maintained until the date upon which the decision becomes final including, if applicable, upon conclusion of any review by the Commission or a federal court.

Time is computed within the Proposed Listings Code based on calendar days. In computing any period of time, the day of the act, event, or default from which the period of time begins is not included. The last day of the period is included, unless it is a Saturday, Sunday, federal holiday, or NASD holiday. An NASD holiday is any day on which the Nasdaq or the executive offices of the NASD are closed for the entire day.

The Proposed Listings Code prohibits any communication relevant to the merits of a proceeding with anyone who is participating in or advising in the consideration of a matter (including members of the Listing Qualifications Panel, Listing Council, or Board of Governors and NASD employees), unless the issuer and the appropriate Nasdaq staff have been provided notice and an opportunity to participate in the communication. The purpose of this limitation is to prevent non-record information from being considered in rendering a decision in a matter. It is currently expected that Nasdaq staff generally will waive their rights under this provision, giving effect to Nasdaq's current general approach where listing decisions are considered in a non-adversarial business forum. The Proposed Listing Code also specifies that if an issuer submits a proposal to resolve matters at issue in a Rule 4800 Series proceeding, communications about that submission will be excluded from the prohibitions discussed above.

Conforming changes are being made to Rules 4330 and 4480, and Rule 4530 is being removed because the substance of that Rule has been relocated to Rule 4820(c).

Effective Date: The renumbering of the existing Rule 4800 Series to the Rule 9700 Series and the changes being made to the Rule 9700 Series will be made effective immediately upon approval of this proposed rule change. The Rule

9700 Series, as hereby proposed, will be removed upon approval of revisions to the Rule 9500 Series that will be separately proposed.

The revised Rule 4800 Series will be made effective immediately upon approval for matters where the issuer has not yet received a Staff Determination, as defined in Rule 4815 of the Proposed Code. For issuers that have received notification from the staff that they will be delisted or denied initial inclusion prior to the date of approval, or that otherwise have matters pending before the Panel or the Listing Council prior to the date of approval, the existing Rule 4800 Series will continue to apply for 180 days. This period will permit Nasdaq to make an orderly transition from the existing rules to the Proposed Listings Code.

2. Statutory Basis

The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹¹ which requires, among other things, that the NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The proposed rule change balances the rights of issuers on the Nasdaq Stock Market with Nasdaq's obligation to protect investors and the public interest. The NASD also believes that the proposed rule change is consistent with the provisions of Section 19(d) of the Act¹² and Rule 19d-1 thereunder,¹³ which govern a self-regulatory organization's obligations upon denying access to the services offered by the self-regulatory organization. The proposed rule change describes all administrative remedies that are available to an issuer prior to final action by the Association, as well as the availability of review by the Commission.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The NASD did not solicit or receive written comments on the Proposed Listings Code.

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

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

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change 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. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR-NASD-98-88 and should be submitted by January 29, 1999.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Margaret H. McFarland,

Deputy Secretary.

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¹¹ 15 U.S.C. 78o-3(b)(6).

¹² 15 U.S.C. 78s-3(d).

¹³ 17 CFR 240.19d-1.

¹⁴ 17 CFR 100.30-3(a)(12).