weakness. Thomson stated that under the self-executing process it supports, the Commission and the SROs ''would function more as report depositories than traditional application examiners.''

The Commission believes that in order for Commission staff to adequately review an Auditor's Report to determine whether it is not unacceptable, the staff must do more than simply read the report to determine whether it contains a finding of material weakness. Under the rule changes, the Commission staff may deem an Auditor's Report unacceptable for any reason if it believes that the report demonstrates that an entity would not be capable of providing confirmation/affirmation services in a manner that would not compromise the integrity of the national clearance and settlement system.

Thomson also contended that there is no legal context in which the Commission staff may issue no action letters to qualified vendors. Thomson stated that the only party to which the Commission staff is authorized to recommend or not recommend enforcement action is the Commission itself and that any such recommendation or decision to not make a recommendation must be related to the federal securities laws or Commission rules promulgated thereunder. Thomson expressed concern that the proposed rule changes do not provide objective standards that the Commission staff will use when considering whether to grant the initial no-action letter.

The Commission believes that the use of a no-action letter to indicate that an entity's initial Auditor's Report is not unacceptable is a reasonable method for indicating that an entity is a qualified vendor under the SROs' rules. Section 21 of the Act, which authorizes the Commission to investigate and to bring enforcement action with respect to violations of the rules of a self-regulatory organization by any person, provides a legal context for the issuance of a no-action letter to qualified vendors.[12] The Commission also believes that the rule changes are reasonably designed to provide objective guidance to the Commission in its review of the Auditor's Reports and to the SROs to deny ''qualified'' status to and to terminate the ''qualified'' status of ETC vendors whose confirmation/affirmation services fall below acceptable standards.

Thomson stated that it agrees with the requirement that a qualified vendor notify the SROs and the Commission staff if it decides to stop providing confirmation/affirmation services. Thomson objected to a provision in the NASD's proposed rule change that states a qualified vendor may cease to be qualified if the Commission staff (1) deems an Auditor's Report unacceptable either because it contains any finding of material weakness or for any other identified reasons or (2) notifies the qualified vendor that it is no longer qualified.

As noted above, the Commission staff may deem an Auditor's Report unacceptable for any reason if it believes that the report demonstrates that an entity would not be capable of providing confirmation/affirmation services in a manner that would not compromise the integrity of the national clearance and settlement system. In addition, the Commission staff may revoke a no-action position if it determines that a revocation is consistent with the public interest or the protection of investors.

III. Discussion

Under Section 19(b)(2) of the Act, the Commission is directed to approve the SROs' proposed rule changes if it finds that they are consistent with the requirements of the Act and the rules and the rules and regulations thereunder applicable to the SROs.[13] Sections 6(b)(5), 15A(b)(6), and 15B(b)(2)(C) of the Act[14] require, among other things, that the SROs' rules be designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities. Sections 6(b)(8), 15A(b)(9), and 15B(b)(2)(C) of the Act[15] also require that the SROs' rules not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. For the reasons discussed below, the Commission believes that the SROs' proposed rule changes are consistent with their obligations under the Act.

The Commission believes that the changes to the SROs' confirmation rules are consistent with the SROs' obligations under the Act because they will require unregulated entities that wish to provide confirmation/affirmation services to establish links and interfaces with a registered clearing agency. This requirement should increase cooperation and coordination among the SROs' members, registered clearing agencies, and entities that become qualified vendors under the rule changes.

In addition, in reviewing the proposed rule changes the Commission has considered whether the proposed rule changes would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Commission believes that the rule changes have been carefully designed to allow unregistered ETC vendors to provide confirmation/affirmation services for institutional trades in a manner which is not unduly burdensome for ETC vendors and which preserves the safety and soundness of the national system for the clearance and settlement of securities transactions. Therefore, the Commission believes that the SROs' proposed rule changes should not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposals are consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act and the rules and regulations thereunder.

It is therefore *ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule changes (File Nos. SR–MSRB–98–06, SR–NASD–98–20, SR–NYSE–98–07) be and hereby are approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[16]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–12139 Filed 5–12–99; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–41367; File No. SR–NASD–98–88]

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

May 4, 1999.

On November 27, 1998, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') a proposed rule change pursuant to

[12] 15 U.S.C. 78u.

[13] 15 U.S.C. 78s(b)(2).

[14] 15 U.S.C. 78f(b)(5), 78o–3(b)(6), and 78o–4(b)(2)(C).

[15] 15 U.S.C. 78f(b)(8), 78o–3(b)(9), and 78o–4(b)(2)(C).

[16] 17 CFR 200.30–3(a)(12).

Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder concerning the procedures followed by the Association in listing and delisting an issuer.[2] The NASD amended the proposal on December 15, 1998.[3] Notice of the proposal, as amended, was published in the **Federal Register** on January 8, 1999 (''Notice'').[4] The Commission did not receive any comment letters on the fling.

I. Introduction and Background

The NASD is proposing to replace its existing rules setting forth the procedures by which issuers may be denied listing on, or delisted from, the Nasdaq Stock Market. The proposed revised code of listings procedures (''Revised Listings Code'') codifies procedures that are already used by the Association in practice. In addition, the Revised Listing Code contains greater detail about the review process and adds a number of provisions, including those for the maintenance of the record on review, fees for reviews, and prohibitions on communications outside of the official proceeding.[5] This proposal is designed to address shortfalls in the NASD's listings procedures identified in the Commission's 21(a) Report and a previous report on the NASD's governance structure.[6]

[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.

[4] *See* Securities Exchange Act Release No. 40874 (December 31, 1998), 64 FR 1258.

[5] The Association is also proposing to temporarily move the existing Rule 4800 Series relating to other grievances concerning the Association's automated systems to the Rule 9700 Series, and reference to the delisting procedures in the current Rule 4800 Series will be removed prior to this relocation. The NASD and NASD Regulation, Inc. plan to file changes to the Rule 9500 Series in the near future 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.

[6] *See* Commission's Report and Appendix to Report Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding the NASD and The Nasdaq Stock Market dated August 8, 1996; Securities Exchange Act Release No. 37538 (August 8, 1996) (SEC Order Instituting Public Proceedings Pursuant to Section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions, *In the Matter of National Association of Securities Dealers, Inc.*, Administrative Proceeding File No. 3–9056); and *Report of the NASD Select Committee on Structure and Governance to the NASD Board of Governors* (1995).

II. Description of the Proposal

The revised Rule 4800 Series applies only to decisions to deny, limit, or prohibit the listing of an issuer's securities on the Nasdaq Stock Market. The substantive criteria for listing on the Nasdaq Stock Market are contained in other portions of the Rule 4000 Series. Rule 4810 of the Revised Listings Code describes the limited purpose of the new Rule 4800 Series as well as certain general provisions.

Rule 4810 also 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 those standards. It is solely within the NASD's discretion whether to grant such an extension. In determining whether to grant an extension or exception, the NASD reviewing body at each level of review will consider the original issue cited, but may also consider any additional issues, regardless of whether they were considered earlier in the proceeding.[7] The Revised Listings Code provides that the NASD will notify the issuer if additional issues are being considered in determining whether to grant a request for an exception or exemption, and the issue will be given an opportunity to respond to such issues.

Rule 4810 particularly notes that ''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.''[8]

Revised Rule 4815 through 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, including retention of records for the various Association adjudicators.[9] Under revised Rule 4815, Nasdaq staff in the Listing Qualifications Department or Listing Investigation Department will notify an issuer in writing of any decision to limit or prohibit the initial or continued listing of its securities. This notification will describe the specific grounds for the determination.

Revised Rule 4820 provides that within 7 calendar days of receipt of this notification, the issuer may request a hearing for review of the determination.[10] If an issuer requests a review, the staff determination will generally be stayed pending the outcome of the review.[11] If no request for review is made, the determination will take effect after the time to request review has expired.

Revised Rule 4830 provides that all requests for review will be considered by an independent panel (''Listing Panel'') composed of at least two persons who are 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 Listing Panel hearing will, to the extent practicable, be scheduled within 45 days of the date that the request for hearing is filed. After the hearing, the Listing Panel will issue a written decision that is effective immediately (unless the decision itself provides otherwise).

Under revised Rule 4840, an issuer may request review of the Listing Panel's decision by the Nasdaq Listing and Hearing Review Council (''Review Council'') within 15 days.[12] In addition, any member of the Review Council may decide to review a decision of the Listing Panel within 45 days of the date of the issuance of that decision. Review Council review of a matter generally

[7] The levels of review are described in the following paragraphs.

[8] *See* revised Rule 4810, *Purpose and General Provisions.*

[9] *See* revised Rule 4830(b) (the record for a proceeding before a Listing Qualification Panel is kept by the Nasdaq Hearings Department); revised Rule 4840(d) (the record for a proceeding before the Review Council is kept by the Nasdaq Office of General Counsel); and revised Rule 4850(b) (the record for a proceeding before the NASD Board is kept by the Nasdaq Office of General Counsel).

[10] The 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 NASD is proposing to relocate the fee provisions from Rule 4530 to revised Rule 4820(c).

[11] The Association is permitted, however, to suspend a security's inclusion in Nasdaq if the securities are not in compliance with the qualification requirements of Rule 4310 or Rule 4320, or those requirements imposed by the NASD under Rule 4330(a). In that event, Nasdaq will notify the issuer prior to the suspension or as soon as practicable thereafter. *See* 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* Rule 4120(a)(5).

[12] The Review Council is a compositionally balanced panel of no fewer than eight and no more than 18 members. Of these members, at least five must be Non-Industry, and not more than 50 percent may be engaged in market-making activity or employed by a member whose revenues from market-making activity exceed ten percent of its total revenues. *See* Nasdaq By-Laws Article 5.2(a).

does not stay the Listing Panel decision (unless the call for review specifies otherwise). The NASD is proposing to impose a $1,400 fee for a Review Council review. This fee is in addition to the current $1,400 fee for the Listing Panel's review of the Nasdaq staff's initial determination.[13]

Under the Revised Listing Code, the Review Council will review matters based on the written record and will issue a decision to affirm, modify, or reverse the Listing Panel's decision. Alternatively, the Review Council can choose to hold additional hearings, or remand the matter to Nasdaq staff or to the Listing Panel.[14] This decision, although subject to a call for review by the NASD Board of Governors (''NASD Board''), will be effective immediately, unless it specifies to the contrary.

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

Revised 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 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 current Nasdaq Stock Market bid price and number of 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.[16]

The Revised Listings Code prohibits any communication relevant to the merits of a proceeding amongst anyone participating in or advising in the consideration of a listing or delisting matter (including members of the Listing Panel, Review Council, or NASD Board and NASD employees), unless the issuer and the appropriate Nasdaq staff have been provided notice and an opportunity to participate in the communication.[17] This proposed limitation is designed to prevent information outside of the record from being considered in rendering a decision in a matter. The NASD indicates that they currently expect Nasdaq staff to waive participation in such communications. The Revised Listings 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.[18]

III. Discussion

The Commission finds that the proposal is consistent with the Act and in particular with those provisions applicable to a national securities association. Specifically, the Commission believes that the proposal is consistent with the requirements of Section 15A(b)(6) of the Act[19] because it is designed to promote just and equitable principles of trade and, in general, to protect investors and the public interest. The Commission believes that the amendments, by codifying, expanding, and clarifying existing procedures, strike a reasonable balance between the Association's obligation to protect investors and their confidence in the market, with its parallel obligation to perfect the mechanism of a free and open market. The amendments provide fair procedures for issuers, while giving Nasdaq the ability to deny, limit, or delist an issuer that has failed to meet the substantive standards outlined in the Rule 4000 Series.

For the most part, the Revised Listings Code codifies present Association procedures. The general system of review remains basically the same. In the past, many of these procedures were not codified, and instead were explained through correspondence during the course of a listing or delisting proceeding. As a result, it was often unclear how certain of the practices or procedures were applied in particular cases. The Revised Listings Code clearly sets forth the procedures applicable to all issuers.

One of the most important clarifications addresses an issuer's ability to request 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 Rule 4800 Series proceeding. While extensions and exceptions have always been granted, their availability was not readily apparent. The Commission believes it is essential for issuers to understand that they may request an extension of, or exception to, the NASD's codified procedures. Although the decision to grant such extensions and exceptions is within the discretion of the Association, the Commission notes that the NASD must exercise that discretion in a manner consistent with the Act generally and, in particular, with Section 15A(b)(6).[20]

The impact of decisions at each level of review is also clarified in the Revised Listings Code. Review of a Listing Panel determination by the Review Council, and review of a Review Council decision by the NASD Board does not stay the previous determination. The ability to issue immediately a decision will allow the Association to act swiftly to delist a non-compliant issuer that is still trading on the Nasdaq Stock Market, or to permit an issuer that was wrongly delisted by the Nasdaq staff to return to the Nasdaq Stock Market more quickly.

Another important clarification is that each adjudicator, from the Nasdaq staff

[13] The new fee is designed to recoup the costs of processing the request for review, including preparing and copying the record on review for the Review Council, covering staff resources within the Nasdaq Office of General Counsel for reviewing the record, advising the Review Council, preparing the decision, and covering a proportionate part of the expense of Review Council meetings. The fee is designed to be revenue neutral, to directly offset the costs associated with the Review Council's review.

[14] The Review Council may, at its sole discretion, also hold additional hearings.

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

[16] Time is computed within the Revised 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 Stock Market or the executive offices of the NASD are closed for the entire day.

[17] *See* revised Rule 4890, *Prohibited Communications.*

[18] The NASD is also proposing to make conforming changes to Rules 4330 and 4480, and Rule 4530 will be removed because the substance of that Rule has been relocated to Rule 4820(c).

[19] 15 U.S.C. 78*o*–3(b)(6).

[20] *Id.* No Association rule may unreasonably discriminate against one group of issuers versus another.

through the NASD Board, has the discretion to supplement the record. Thus, at each level of a proceeding under the Rule 4800 Series, the Listing Panel, Review Council, or the NASD Board, as part of its respective review, may:

1. Request additional information from the issuer;
2. 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; and
3. 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 given an opportunity to respond to actions taken by the adjudicator. The Commission believes that the ability to supplement the record with the most up-to-date information regarding the issuer will help to ensure that the reviewing body's decision is informed and appropriate under the circumstances.

There are also several new features in the Revised Listings Code. One of the most important restricts communication between Association adjudicators and parties to a listing determination.[21] For example, the revised rules restrict communication between adjudicators and either the Nasdaq staff or the issuer, unless both are given the opportunity to participate. In addition, any prohibited communication must be entered in the record of the proceeding. The Commission believes that these safeguards will help to ensure greater fairness and openness in Association listings proceedings.

The Revised Listings Code also adds a comprehensive explanation of the content of the official record of a listing proceeding,[22] as well as how the record is maintained through various levels of review.[23] This provision is another important improvement that should help to ensure that issuers are made aware of those factors that are considered in a listing or delisting decision, which in turn should assist them in challenging a decision that is adverse to them.

Finally, the Revised Listings Code imposes fees for Association review.[24] The Commission believes that these fees are consistent with Section 15A(b)(5) of the Act, which permits the allocation of fees on issuers using any facility or system that the Association operates or controls. Specifically, the Commission believes that the proposal provides for the equitable allocation of reasonable fees among issuers using the resources of the Association. The Commission also believes that these fees are reasonable under the circumstances in that they are designed to recoup the costs of processing requests for review and holding the subsequent hearings.

The renumbering of the existing Rule 4800 Series to the Rule 9700 Series, as revised, will be effective immediately upon approval of this revised rule change.[25] 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 Revised Listings 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 Listing Panel or the Review Council prior to the date of approval of these rule changes, the existing Rule 4800 Series will continue to apply for 180 days. The Commission believes that this staggered schedule is appropriate because it will allow the Association to make an orderly transition from the existing rules to the Revised Listings Code.

IV. Conclusion

The Commission believes that the proposed rule change is consistent with Act, and, particularly, with Section 15A.[26] in approving the proposal, the Commission has considered its impact on efficiency, competition, and capital formation.[27]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[28] that the proposed rule change (SR–NASD–98–88) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[29]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–12064 Filed 5–12–99; 8:45 am]

BILLING CODE 8010–01–M

[21] *See* revised Rule 4890, *Prohibited Communications.*

[22] *See* revised Rule 4870, *Record on Review.*

[23] *See* revised Rule 4830(b).

[24] *See* revised Rules 4820(c) and 4840(b).

[25] *See supra* note 5, discussing relocation of the current Rule 4800 Series, *Grievances Concerning The Automated Systems,* to the Rule 9700 Series.

[26] 15 U.S.C. § 78*o*–3.

[27] 15 U.S.C. § 78c(f).

[28] 15 U.S.C. 78s(b)(2).

[29] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–41371; File No. SR–NASD–98–96; Amendment No. 4]

Self-Regulatory Organizations; Notice of Filing of Amendment No. 4 to Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Amendments to Forms U–4 and U–5

May 5, 1999.

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 April 28, 1998, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association''), through its wholly owned subsidiary NASD Regulation, Inc. (''NASD Regulation'' or ''NASDR''), filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') Amendment No. 4 to the proposed rule change[3] as described in Items I, II and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change as further amended by Amendment No. 4 from interested persons.

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

Amendment No. 4 provides additional detail on how NASDR will process the Proposed Forms U–4 and U–5.

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

In its filing with the Commission, NASDR 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. NASDR has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Commission previously published notice of the proposed rule change on April 22, 1999. *See* Securities Exchange Act Release No. 41326 (April 22, 1999), 64 FR 23366 (April 30, 1999) (File No. SR–NASD–98–96).