

principal.<sup>4</sup> However, the Exchange believes that this recent change to Commentary .02 of Amex Rule 126(g) continues to put orders for the accounts of non-member brokers and dealers in a more advantageous position than Amex specialists and Registered Traders, but, more importantly, continues to put orders for the accounts of non-member brokers and dealers in a more advantageous position than public customer orders represented in the trading crowd and on the specialist's book at the clean agency cross price. This is because such non-member broker-dealer orders always have priority over public customer (non-broker or dealer) orders at the clean agency cross price. In addition, such orders can participate in a clean agency cross even though an Amex specialist or Registered Trader is prohibited from interacting with a clean agency cross to provide price improvement.

The Exchange believes it is appropriate to amend Amex Rule 126(g), Commentary .02 to limit the advantages offered by this rule to public customer orders only, and not to orders for the accounts of brokers or dealers. This change will prohibit orders for the accounts of brokers and dealers (including all U.S. and foreign registered brokers or dealers) from having priority over existing bids and offers and from engaging in crosses without risk of being broken up by a specialist and/or Registered Trader who wishes to trade at an improved price with one side or the other of the cross. The Exchange believes this change will facilitate the efficient crossing of public customer orders by placing non-member brokers and dealers in the same position as member brokers and dealers with respect to crossing procedures under Commentary .02 of Amex Rule 126(g).

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act<sup>5</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>6</sup> in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in

general, to protect investors and the public interest, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

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

The Exchange believes that the proposed rule change will impose no burden on competition 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

No written comments were solicited or received with respect to the proposed rule change.

## III. Date of Effectiveness of the 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 Exchange 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 proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change, as amended, that are filed with the Commission, and all written communications relating to the proposed rule change, as amended, 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 Amex. All submissions should refer to file number SR-Amex-2003-47 and should be submitted by August 26, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>7</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 03-19823 Filed 8-4-03; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48253; File No. SR-NASD-2003-115]

### Self Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Listing and Trading of Industrial 15 Notes

July 29, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on July 29, 2003, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II 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 and to approve the proposal on an accelerated basis.

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

Nasdaq proposes to list and trade Strategic Return Notes' linked to the Industrial 15 Index ("Notes") issued by Merrill Lynch & Co., Inc. ("Merrill Lynch").

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

In its filing with the Commission, Nasdaq 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 III below. Nasdaq has prepared summaries, set forth in Sections A, B,

<sup>4</sup> See Securities Exchange Act Release No. 47345 (February 11, 2003), 68 FR 8316 (February 20, 2003).

<sup>5</sup> 15 U.S.C. 78f(b).

<sup>6</sup> 15 U.S.C. 78f(b)(5).

<sup>7</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

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

Nasdaq proposes to list and trade notes, the return on which is based upon the fifteen highest dividend yielding stocks from a group of certain stocks in Standard & Poor's ("S&P") Industrial Index<sup>3</sup> from year to year that meet the additional criteria set forth below ("Industrial 15 Index" or "Index").<sup>4</sup>

Under NASD Rule 4420(f), Nasdaq may approve for listing and trading innovative securities which cannot be readily categorized under traditional listing guidelines.<sup>5</sup> Nasdaq proposes to list for trading the Notes under NASD Rule 4420(f). Nasdaq represents that the Industrial 15 Index is to be determined, calculated and maintained solely by the American Stock Exchange LLC ("Amex").<sup>6</sup>

The Notes will initially be subject to Nasdaq's listing criteria for other securities under NASD Rule 4420(f). Specifically, under NASD Rule 4420(f)(1):<sup>7</sup>

(A) The issuer shall have assets in excess of \$100 million and stockholders' equity of at least \$10 million. In the case of an issuer which is unable to satisfy the income criteria set forth in paragraph (a)(1), Nasdaq generally

will require the issuer to have the following: (i) Assets in excess of \$200 million and stockholders' equity of at least \$10 million; or (ii) assets in excess of \$100 million and stockholders' equity of at least \$20 million;

(B) There must be a minimum of 400 holders of the security, provided, however, that if the instrument is traded in \$1,000 denominations, there must be a minimum of 100 holders;

(C) For equity securities designated pursuant to this paragraph, there must be a minimum public distribution of 1,000,000 trading units;

(D) The aggregate market value/principal amount of the security will be at least \$4 million.

In addition, Nasdaq represents that Merrill Lynch satisfies the listed marketplace requirement set forth in NASD Rule 4420(f)(2).<sup>8</sup> Lastly, pursuant to NASD Rule 4420(f)(3), prior to the commencement of trading of the Notes, Nasdaq will distribute a circular to members providing guidance regarding compliance responsibilities and requirements, including suitability recommendations, and highlighting the special risks and characteristics of the Notes. In particular, Nasdaq will advise members recommending a transaction in the Notes to: (1) Determine that such transaction is suitable for the customer; and (2) have a reasonable basis for believing that the customer can evaluate the special characteristics of, and is able to bear the financial risks of, such transaction.

The Notes will be subject to Nasdaq's continued listing criterion for other securities pursuant to NASD Rule 4450(c). Under this criterion, the aggregate market value or principal amount of publicly-held units must be at least \$1 million. The Notes also must have at least two registered and active market makers as required by NASD Rule 4310(c)(1). Nasdaq will also prohibit the continued listing of the Notes if Merrill Lynch is not able to meet its obligations on the Notes.<sup>9</sup>

The Notes are a series of senior non-convertible debt securities of Merrill Lynch that provide for a single payment at maturity. The Notes will have a term of not less than one, nor more than ten, years. The Notes will entitle the owner at maturity to receive an amount based

<sup>8</sup> NASD Rule 4420(f)(2) requires issuers of securities designated pursuant to this paragraph to be listed on Nasdaq or the New York Stock Exchange ("NYSE") or be an affiliate of a company listed on The Nasdaq National Market or the NYSE; provided, however, that the provisions of Rule 4450 will be applied to sovereign issuers of "other" securities on a case-by-case basis.

<sup>9</sup> Telephone call between Sapna C. Patel, Attorney, Division of Market Regulation, Commission, and John Nachmann, Senior Attorney, Office of the General Counsel, Nasdaq, on July 29, 2003.

upon the percentage change between the "Starting Index Value" and the "Ending Index Value" (the "Redemption Amount"). The "Starting Index Value" is the value of the Industrial 15 Index on the date on which Merrill Lynch prices the Notes for the initial sale to the public. The "Ending Index Value" is the value of the Industrial 15 Index over a period shortly prior to the expiration of the Notes. The Ending Index Value will be used in calculating the amount owners will receive upon maturity. The Notes may not have a minimum principal amount that will be repaid and, accordingly, payments on the Notes prior to or at maturity may be less than the original issue price of the Notes. During the designated month each year, the investors may have the right to require Merrill Lynch to repurchase the Notes at a redemption amount based on the value of the Industrial 15 Index at such repurchase date. The Notes are not callable by Merrill Lynch.

The Notes are cash-settled in U.S. dollars and do not give the holder any right to receive a portfolio security or any other ownership right or interest in the portfolio securities, although the return on the investment is based on the aggregate portfolio value of the Industrial 15 Index securities.

The Industrial 15 Index will consist of the a portfolio of the fifteen qualifying stocks ("Qualifying Stocks") with the highest dividend yields at the time of initial composition or any reconstitution of the Industrial 15 Index. Qualifying Stocks are those stocks from the S&P Industrial Index that are (1) In the top 75% of the Index, as measured by market capitalization after elimination of stocks included in the Dow Jones Industrial Average ("DJIA"), and (2) have an S&P Common Stock Ranking of A or A+.

Components of the Industrial 15 Index approved pursuant to this filing will meet the following criteria: (1) A minimum market value of at least \$75 million, except that up to 10% of the component securities in the Industrial 15 Index may have a minimum market value of \$50 million; (2) average monthly trading volume in the last six months of not less than 1,000,000 shares, except that up to 10% of the component securities in the Industrial 15 Index may have an average monthly trading volume of 500,000 shares or more in the last six months; (3) 90% of the Industrial 15 Index's numerical value and at least 80% of the total number of component securities will meet the then current criteria for standardized option trading set forth in Amex Rule 915; and (4) all component

<sup>3</sup> The S&P Industrial Index is a subset of the S&P 500 Index consisting of the largest 400 industrial stocks of the S&P 500. The S&P Industrial Index is calculated by starting with the S&P 500 Index and then excluding financial, utility and transportation stocks.

<sup>4</sup> As of June 24, 2003, the portfolio of securities comprising the Industrial 15 Index are as follows: Abbott Laboratories; Albertson's, Inc.; Anheuser-Busch Companies Inc.; Bristol-Myers Squibb Company; The Clorox Company; ConAgra Foods, Inc.; Colgate-Palmolive Company; Emerson Electric Co.; Ingersoll-Rand Company Limited; Johnson Controls, Inc.; Paychex, Inc.; Pfizer, Inc.; Rohm and Haas Company; Schering-Plough Corporation; and Wm. Wrigley Jr. Company.

The portfolio of securities will include the fifteen highest dividend yielding stocks from a group of certain stocks in the S&P Industrial Index for that year and Nasdaq represents that the Amex will not have any discretion in the selection process.

<sup>5</sup> See Securities Exchange Act Release No. 32988 (September 29, 1993); 58 FR 52124 (October 6, 1993).

<sup>6</sup> Subject to the criteria in the prospectus supplement regarding the construction of the Index, Nasdaq represents that the Amex has sole discretion regarding changes to the Index due to annual reconstitutions and adjustments to the Index and the multipliers of the individual components.

<sup>7</sup> Nasdaq represents that Merrill Lynch and the Notes satisfy these listing criteria. Telephone call between Sapna C. Patel, Attorney, Division of Market Regulation, Commission, and John Nachmann, Senior Attorney, Office of the General Counsel, Nasdaq, on July 29, 2003.

stocks will either be listed on the Amex, the NYSE, or traded through the facilities of Nasdaq and reported National Market System securities.

As of July 9, 2003, Nasdaq represents that the market capitalization of the portfolio of securities representing the Industrial 15 Index ranged from a high of \$258.6 billion to a low of \$6.7 billion. The average monthly trading volume for the last six months, as of the same date, ranged from a high of 20.2 million shares to a low of 0.6 million shares. Moreover, as of July 29, 2003, Nasdaq represents that all of the components comprising the portfolio of securities representing the Industrial 15 Index were eligible for standardized options trading pursuant to Amex Rule 915.

The value of the Industrial 15 Index at any time will equal: (1) The sum of the products of the current market price for each stock underlying the Industrial 15 Index and the applicable share multiplier,<sup>10</sup> plus (2) an amount reflecting current calendar quarter dividends, and less (3) a pro rata portion of the annual index adjustment factor.<sup>11</sup> Nasdaq represents that current quarter dividends for any day will be determined by the Amex and will equal the sum of each dividend paid by the issuer on one share of stock underlying the Industrial 15 Index during the current calendar quarter multiplied by the share multiplier applicable to such stock on the ex-dividend date.

Nasdaq represents that, as of the first day of the start of each calendar quarter, the Amex will allocate the current quarter dividends as of the end of the immediately preceding calendar quarter to each then outstanding components of the Industrial 15 Index. The amount of the current quarter dividends allocated to each stock will equal the percentage of the value of such stock contained in the portfolio of securities comprising the Industrial 15 Index relative to the value of the entire portfolio based on the closing market price of such stock on the last day in the immediately preceding calendar quarter. The share multiplier of each stock will be increased to reflect the number of shares, or portion of a share, that the

amount of the current quarter dividend allocated to each stock can purchase of each stock based on the closing market price on the last day in the immediate preceding calendar quarter.

Nasdaq represents that, as of the close of business on each anniversary date (June 26th of each year, which is the anniversary of the date the Industrial 15 Index was originally calculated and disseminated) through the applicable anniversary date in the year preceding the maturity of the Notes, the portfolio of securities comprising the Industrial 15 Index will be reconstituted by the Amex so as to include the fifteen Qualifying Stocks in the S&P Industrial Index having the highest dividend yield on the second scheduled index business day prior to the applicable anniversary date. Nasdaq also represents that the Amex will announce such changes to investors at least one day prior to the anniversary date.<sup>12</sup>

The portfolio will be reconstituted and rebalanced on the anniversary date so that each stock in the Industrial 15 Index will represent 6.67% of the value of the Industrial 15 Index. To effectuate this, Nasdaq represents that the share multiplier for each new stock will be determined by the Amex and will indicate the number of shares or fractional portion thereof of each new stock, given the closing market price of such new stock on the anniversary date, so that each new stock represents an equal percentage of the Industrial 15 Index value at the close of business on such anniversary date. For example, if the Industrial 15 Index value at the close of business on an anniversary date was 150, then each of the fifteen new stocks comprising the Industrial 15 Index would be allocated a portion of the value of the Index equal to 10, and if the closing market price of one such new stock on the anniversary date was 20, the applicable share multiplier would be 0.5. Conversely, if the Industrial 15 Index value was 60, then each of the fifteen new stocks comprising the Industrial 15 Index would be allocated a portion of the value of the Industrial 15 Index equal to 4, and if the closing market price of one such new stock on the anniversary was 20, the applicable share multiplier would be 0.2. The last anniversary date on which such reconstitution will occur will be the anniversary date in the year preceding the maturity of the Notes. As noted above, investors will receive information on the new portfolio of

securities comprising the Industrial 15 Index at least one day prior to each anniversary date.

The multiplier of each component stock in the Industrial 15 Index will remain fixed unless adjusted for quarterly dividend adjustments, annual reconstitutions or certain corporate events, such as payment of a dividend other than an ordinary cash dividend, a distribution of stock of another issuer to its shareholders,<sup>13</sup> stock split, reverse stock split, and reorganization.

The multiplier of each component stock may be adjusted, if necessary, in the event of a merger, consolidation, dissolution or liquidation of an issuer or in certain other events such as the distribution of property by an issuer to shareholders. If the issuer of a stock included in the Industrial 15 Index were to no longer exist, whether by reason of a merger, acquisition or similar type of corporate transaction, a value equal to the stock's final value will be assigned to the stock for the purpose of calculating the Industrial 15 Index value prior to the subsequent anniversary date. For example, if a company included in the Industrial 15 Index were acquired by another company, a value will be assigned to the company's stock equal to the value per share at the time the acquisition occurred. If the issuer of stock included in the Industrial 15 Index is in the process of liquidation or subject to a bankruptcy proceeding, insolvency, or other similar adjudication, such security will continue to be included in the Industrial 15 Index so long as a market price for such security is available or until the subsequent anniversary date. If a market price is no longer available for an Industrial 15 Index stock due to circumstances including but not limited to, liquidation, bankruptcy, insolvency, or any other similar proceeding, then the security will be assigned a value of zero when calculating the Industrial 15 Index for so long as no market price exists for that security or until the subsequent anniversary date. If the stock remains in the Industrial 15 Index, the multiplier of that security in the Industrial 15 Index may be adjusted to maintain the component's relative weight in the Industrial 15 Index at the level immediately prior to the corporate action. In all cases, the multiplier will

<sup>10</sup> The multiplier indicates the number of shares (or fraction of one share) of a security, given its market price on an exchange or Nasdaq, to be included in the calculation of the portfolio.

<sup>11</sup> At the end of each day, the Industrial 15 Index will be reduced by a pro rata portion of the annual index adjustment factor, 1.5% (i.e., 1.5%/365 days = 0.0041% daily). This reduction to the value of the Index will reduce the total return to investors upon redeeming the Notes at maturity. An explanation of this deduction will be included in any marketing materials, fact sheets, or any other materials circulated to investors regarding the trading of this product.

<sup>12</sup> Nasdaq represents that the Amex will publish a notice to advise investors of changes to the securities underlying the Industrial 15 Index if any such changes are made following an annual reconstitution.

<sup>13</sup> If the issuer of a component security in the Industrial 15 Index issues to all of its shareholders publicly traded stock of another issuer, such new securities will be added to the portfolio comprising the Industrial 15 Index until the subsequent anniversary date. The multiplier for the new component will equal the product of the original issuer's multiplier and the number of shares of the new component issued with respect to one share of the original issuer.

be adjusted, if necessary, to ensure Industrial 15 Index continuity.

Nasdaq represents that the Amex will calculate the Industrial 15 Index and, similar to other stock index values published by the Amex, the value of the Index will be calculated continuously and disseminated every fifteen seconds over the Consolidated Tape Association's Network B.<sup>14</sup> The Index value will equal the sum of the products of the most recently available market prices and the applicable multipliers for the component securities.

Since the Notes will be deemed equity securities for the purpose of Rule 4420(f), the NASD and Nasdaq's existing equity trading rules will apply to the Notes. First, pursuant to Rule 2310 and IM-2310-2, members must have reasonable grounds for believing that a recommendation to a customer regarding the purchase, sale or exchange of any security is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.<sup>15</sup> In addition, Nasdaq will distribute a circular to advise members recommending a transaction in the Notes to, among other things, have a reasonable basis for believing that the customer can evaluate the special characteristics of, and is able to bear the financial risks of, such transaction. Furthermore, the Notes will be subject to the equity margin rules. Lastly, the regular equity trading hours of 9:30 am to 4:00 pm will apply to transactions in the Notes.

Nasdaq represents that NASD's surveillance procedures are adequate to properly monitor the trading of the Notes. Specifically, NASD will rely on its current surveillance procedures governing equity securities, and will include additional monitoring on key pricing dates.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the

<sup>14</sup> Nasdaq will prohibit the continued listing of the Notes if the Amex discontinues publication of the Industrial 15 Index and a successor index or index value is not disseminated every 15 seconds during calculation days. Telephone call between Sapna C. Patel, Attorney, Division of Market Regulation, Commission, and John Nachmann, Senior Attorney, Office of the General Counsel, Nasdaq, on July 29, 2003.

<sup>15</sup> Rule 2310(b) requires members to make reasonable efforts to obtain information concerning a customer's financial status, a customer's tax status, the customer's investment objectives, and such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer.

provisions of Section 15A of the Act,<sup>16</sup> in general, and with Section 15A(b)(6) of the Act,<sup>17</sup> in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. Specifically, the proposed rule change will provide investors with another investment vehicle based on an index of the fifteen highest dividend yielding stocks from a group of certain stocks in the S&P Industrial Index.

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

Nasdaq 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, as amended.

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

Written comments were neither solicited nor received.

## III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. 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 number SR-NASD-2003-115 and should be submitted by August 26, 2003.

<sup>16</sup> 15 U.S.C. 78o-3.

<sup>17</sup> 15 U.S.C. 78o-3(b)(6).

## IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of Section 15A(b)(6) of the Act.<sup>18</sup> The Commission notes that it has previously approved the listing of Industrial 15 Index notes on the Amex.<sup>19</sup> Furthermore, the Commission finds that this proposal is similar to several other approved instruments currently listed and traded on the Amex and the NYSE.<sup>20</sup> Accordingly, the Commission finds that the listing and trading of the Notes on Nasdaq is consistent with the Act and will promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and, in general, protect investors and the public interest consistent with Section 15A(b)(6) of the Act.<sup>21</sup>

The Notes are not leveraged instruments; however, their price will still be derived and based upon the

<sup>18</sup> 15 U.S.C. 78o-3(b)(6).

<sup>19</sup> See Securities Exchange Act Release No. 44437 (June 18, 2001) 66 FR 33585 (June 22, 2001) (accelerated approval for listing and trading of Industrial 15 Index on the Amex).

<sup>20</sup> See Securities Exchange Act Release Nos. 44342 (May 23, 2001), 66 FR 29613 (May 31, 2001) (accelerated approval order for the listing and trading of Select Ten Notes); 42582 (March 27, 2000), 65 FR 17685 (April 4, 2000) (accelerated approval order for the listing and trading of notes linked to a basket of no more than twenty equity securities) (File No. SR-Amex-99-42); 41546 (June 22, 1999), 64 FR 35222 (June 30, 1999) (accelerated approval order for the listing and trading of notes linked to a narrow based index with a non-principal protected put option) (File No. SR-Amex-99-15); 39402 (December 4, 1997), 62 FR 65459 (December 12, 1997) (notice of immediate effectiveness for the listing and trading non-principal protected commodity preferred securities linked to certain commodities indices) (File No. SR-Amex-97-47); 37533 (August 7, 1996), 61 FR 42075 (August 13, 1996) (accelerated approval order for the listing and trading of the Top Ten Yield Market Index Target Term Securities ("MITTS")) (File No. SR-Amex-96-28); 33495 (January 19, 1994), 59 FR 3883 (January 27, 1994) (accelerated approval order for the listing and trading of Stock Upside Note Securities) (File No. SR-Amex-93-40); 32840 (September 2, 1993), 58 FR 47485 (September 9, 1993) (accelerated approval order for the listing and trading of MITTS on the NYSE) (File No. SR-NYSE-93-31); and 32343 (May 20, 1993), 58 FR 30833 (May 27, 1993) (accelerated approval order for the listing and trading of non-principal protected notes linked to a single equity security) (File No. SR-Amex-92-42).

<sup>21</sup> 15 U.S.C. 78o-3(b)(6). In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

underlying linked security. Accordingly, the level of risk involved in the purchase or sale of the Notes is similar to the risk involved in the purchase or sale of traditional common stock. Nonetheless, because the final rate of return of the Notes is derivatively priced, based on the performance of a portfolio of securities, and the components of the Industrial 15 Index are more likely to change each year, over the term of the Notes, than products previously issued, there are several issues regarding the trading of this type of product.

The Commission notes that Nasdaq's rules and procedures that address the special concerns attendant to the trading of hybrid securities will be applicable to the Notes. In particular, by imposing the hybrid listing standards and the suitability, disclosure, and compliance requirements noted above, the Commission believes that Nasdaq has addressed adequately the potential problems that could arise from the hybrid nature of the Notes. Moreover, Nasdaq will distribute a circular to its membership calling attention to the specific risks associated with the Notes.

In approving the product, the Commission recognizes that the components are likely to change each year over the life of the product. Nevertheless, the Commission believes that this is acceptable because the Amex has clearly stated the guidelines and formula for replacing components from a specific group of well-known and highly capitalized securities. Each year, as noted above, the portfolio of securities comprising the Industrial 15 Index will represent the fifteen highest dividend yielding Qualifying Stocks in the S&P Industrial Index. Nasdaq represents that the Amex will do the calculation for replacements based on a set formula to determine which of the S&P Industrial Index securities will be in the Index for the following year. The Commission believes that within these confines the potential frequent changes in the components of the Industrial 15 Index are reasonable and will meet the expectation of investors.

In addition, the Commission notes that the Notes are non-principal protected. The Notes may not have a minimum principal amount that will be repaid, and payments on the Notes prior to or at maturity may be less than their original issue price. The Commission also recognizes that during the designated month, investors may require the issuer to repurchase the Notes at a redemption amount based on the value of the Industrial 15 Index at such repurchase date.

The Commission notes that the Notes are dependent upon the individual credit of the issuer, Merrill Lynch. To some extent, this credit risk is minimized by Nasdaq's listing standards in NASD Rules 4420(f)(1) and 4420(f)(2), which provide that only issuers satisfying substantial asset and equity requirements may issue securities such as the Notes. In addition, Nasdaq's hybrid listing standards further require that the Notes have at least \$4 million in market value.<sup>22</sup> In any event, financial information regarding Merrill Lynch, in addition to the information on the issuers of the underlying securities comprising the Industrial 15 Index, will be publicly available.<sup>23</sup>

The Commission also has a systemic concern, however, that a broker-dealer, such as Merrill Lynch, or a subsidiary providing a hedge for the issuer will incur position exposure. As discussed in the prior approval orders for similar instruments (e.g., the Select Ten Notes and the Industrial 15 Notes for the Amex), the Commission believes this concern is minimal given the size of the Notes issuance in relation to the net worth of Merrill Lynch.

The Commission also believes that the listing and trading of the Notes should not unduly impact the market for the underlying securities comprising the Industrial 15 Index. First, the underlying securities comprising the S&P Industrial Index, from which the Industrial 15 Index components are selected, are well-capitalized, highly liquid stocks. Second, because all of the components of the Industrial 15 Index will be equally weighted, initially and immediately following each annual reconstitution of the Industrial 15 Index, no single stock or group of stocks will likely dominate the Industrial 15 Index. Finally, the issuers of the underlying securities comprising the Industrial 15 Index are subject to reporting requirements under the Act, and all of the portfolio securities are either listed or traded on, or traded through the facilities of, U.S. securities markets. Additionally, Nasdaq's surveillance procedures will serve to deter as well as detect any potential manipulation.

Finally, the Commission notes that the value of the Industrial 15 Index will be disseminated at least once every fifteen seconds throughout the trading day. The Commission believes that providing access to the value of the Industrial 15 Index at least once every fifteen seconds throughout the trading day is extremely important and will

provide benefits to investors in the product.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. In determining to grant the accelerated approval for good cause, the Commission notes that the Industrial 15 Index is a portfolio of highly capitalized and actively traded securities similar to hybrid securities products that have been approved by the Commission for U.S. exchange trading and is also similar to several other instruments currently listed and traded on the Amex and the NYSE, including the Industrial 15 Notes on the Amex.<sup>24</sup> Additionally, the Notes will be listed pursuant to existing hybrid security listing standards as described above. Based on the above, the Commission finds, consistent with Section 15A(b) of the Act,<sup>25</sup> that there is good cause for accelerated approval of the product.

## V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>26</sup> that the proposed rule change (SR-NASD-2003-115), is hereby approved on an accelerated

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>27</sup>

**Margaret H. McFarland,**  
*Deputy Secretary.*

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## SMALL BUSINESS ADMINISTRATION

### [Declaration of Disaster #3528]

#### State of Ohio; (Amendment #2)

In accordance with the notice received from the Department of Homeland Security—Federal Emergency Management Agency, effective July 29, 2003, the above numbered declaration is hereby amended to include Crawford and Pike counties as disaster areas due to damages caused by severe storms and flooding occurring on July 4, 2003 and continuing through July 11, 2003.

In addition, applications for economic injury loans from small businesses located in the contiguous counties of Adams, Highland, Huron, Jackson, Marion, Morrow, Richland, Ross, Scioto, Seneca and Wyandot in the State of

<sup>24</sup> See *supra* notes 19–20.

<sup>25</sup> 15 U.S.C. 78o-3(b).

<sup>26</sup> 15 U.S.C. 78s(b)(2).

<sup>27</sup> 17 CFR 200.30-3(a)(12).

<sup>22</sup> See NASD Rule 4420(f)(1)(D).

<sup>23</sup> The companies that comprise the Industrial 15 Index are reporting companies under the Act.