

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

Written comments relating to the proposed rule change have not yet been solicited or received. FICC will notify the Commission of any written comments it receives.

**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 ninety 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 proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-FICC-2004-09 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-FICC-2004-09. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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 Section, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of FICC and on FICC's Web site at <http://ficc.com/gov/gov.docs.jsp?NS-query=>. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FICC-2004-09 and should be submitted on or before December 21, 2004.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>8</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E4-3384 Filed 11-29-04; 8:45 am]

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-50724; File No. SR-NASD-2004-132]

**Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change and Amendment No. 1 Thereto Relating to the Listing and Trading of Accelerated Return Notes Linked to the Russell 2000 Index**

November 23, 2004.

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 August 31, 2004, 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, II, and III below, which items have been prepared by Nasdaq. On October 22, 2004, Nasdaq filed an amendment to the proposed rule

change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons and is approving the proposal, as amended, 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 accelerated return notes linked to the Russell 2000 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, 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 the Notes, which may provide for a return based upon the market performance of the Russell 2000 Index ("Index").

**The Index**

The Index is a capitalization-weighted index maintained by Frank Russell Company ("FRC"). It is designed to track the performance of 2,000 common stocks of corporations with small market capitalizations relative to other stocks in the U.S. equity market. The companies represented in the Index are domiciled in the U.S. and its territories and cover a wide range of industries. All 2,000 stocks underlying the Index are traded on the New York Stock Exchange, Inc., the American Stock Exchange, LLC, or Nasdaq and form a part of the Russell 3000 Index. The Russell 3000 Index is comprised of the 3,000 largest U.S. companies based on market capitalization, and it represents

<sup>3</sup> See letter from Alex Kogan, Associate General Counsel, Office of General Counsel, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated October 21, 2004 ("Amendment No. 1"). In Amendment No. 1, Nasdaq clarified the calculation of the Russell 2000 Index and the application of its continued listing standards to the Notes.

<sup>8</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.

approximately 98% of the U.S. equity market.

The Index measures the price performance of the shares of common stock of the smallest 2,000 companies included in the Russell 3000 Index, which represented approximately 8% of the total market capitalization of the Russell 3000 Index as of August 31, 2004.<sup>4</sup> The Index is designed to track the performance of the small capitalization segment of the U.S. equity market. The Index is defined, assembled, and calculated by FRC without regard to the Notes.

Only companies domiciled in the U.S. and its territories are eligible for inclusion in the Index. Companies domiciled in other countries are excluded from the Index, even if their common stock shares are traded on U.S. markets. Preferred stock, convertible preferred stock, participating preferred stock, paired shares, warrants, and rights are also excluded. Trust receipts, Royalty Trusts, limited liability companies, OTC Bulletin Board and Pink Sheets' quoted stock, closed-end mutual funds, and limited partnerships that are traded on U.S. exchanges are also ineligible for inclusion in the Index. Real Estate Investment Trusts and Beneficial Trusts are eligible for inclusion, however. In general, only one class of shares of a company is allowed in the Russell 3000 Index, although exceptions to this general rule have been made where FRC has determined that each class of shares acts independently.

The primary criteria used to determine the initial list of securities eligible for the Russell 3000 Index is total market capitalization, which is defined as the price of the shares times the total number of shares outstanding. Based on closing values on May 31 of each year, FRC reconstitutes the composition of the Russell 3000 Index using the then existing market capitalizations of eligible companies to reflect changes in capitalization rankings and shares available. If a stock ceases to trade as a result of a merger or acquisition during the year, then the stock would be deleted from the Index immediately, but would not be replaced until the subsequent annual recapitalization. No interim replacements will be made. As of June 30 of each year, the Index is adjusted to reflect the reconstitution of the Russell 3000 Index for that year.

As of August 19, 2004, the market capitalization of the Index components ranged from approximately \$70 million

to approximately \$3.92 billion. As of the same date, the Index's highest weighted component stock constituted approximately 0.195% of the Index's market capitalization, and the top five component stocks constituted approximately 0.956% of the Index's market capitalization. For a 30-day period prior to August 19, 2004, the average daily trading volume of an "average" Index component was approximately 195,000 shares.<sup>5</sup>

As a capitalization-weighted index, the Index reflects changes in the capitalization, or market value, of the component stocks relative to the capitalization on a base date. The current Index value is calculated by adding the market values of the Index's component stocks, which are derived by multiplying the price of each stock by the number of shares outstanding to arrive at the total market capitalization of the 2,000 stocks. The total market capitalization is then divided by a divisor, which represents the "adjusted" capitalization of the Index on the base date of December 31, 1986. To calculate the Index, last sale prices are used for exchange-traded and Nasdaq stocks. If a component stock is not open for trading, the most recently traded price for that security is used in calculating the Index. To provide continuity for the Index's value, the divisor is adjusted periodically to reflect certain events, including changes in the number of common shares outstanding for component stocks, company additions or deletions, corporate restructurings, and other capitalization changes. As of August 19, 2004, the divisor was 1,735,296.

The Index value is widely disseminated throughout the trading day because complete, "real-time" dissemination of the Index value, updated at least every 15 seconds, is available from numerous independent sources, such as vendors, including Bloomberg and Reuters. The value of the Index on a delayed basis can be accessed by individual investors at <http://finance.yahoo.com/q?s=^RUT&d=t>. The last sale information for the Notes is disseminated on a real time basis on Tape C and a variety of other sources.<sup>6</sup>

<sup>5</sup>To obtain this average daily trading volume figure, the average daily trading volume of all of the Index's components was averaged over a 30-day period. Telephone conversation between Florence E. Harmon, Senior Special Counsel, Division of Market Regulation, Commission, and Alex Kogan, Associate General Counsel, Office of General Counsel, Nasdaq, on November 16, 2004.

<sup>6</sup>Telephone conversation between Florence E. Harmon, Senior Special Counsel, Division of Market Regulation, Commission, and Alex Kogan,

In the event that the calculation and this type of dissemination of the Index is discontinued, Nasdaq will delist the Notes.<sup>7</sup>

#### Other Information

Under NASD Rule 4420(f) ("Other Securities"), Nasdaq may approve for listing and trading securities that cannot be categorized readily under traditional listing guidelines.<sup>8</sup> Nasdaq proposes to list the Notes for trading under the initial listing criteria of NASD Rule 4420(f). Specifically, under NASD Rule 4420(f)(1):

(A) The issuer shall have assets in excess of \$100 million and stockholders' equity of at least \$10 million.<sup>9</sup> In the case of an issuer that 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; and

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

In addition, Merrill Lynch satisfies the listed marketplace requirement set forth in NASD Rule 4420(f)(2).<sup>10</sup> Pursuant to NASD Rule 4420(f)(3), prior to the commencement of trading of the Notes, Nasdaq will distribute a circular to members to provide guidance on compliance responsibilities and requirements, including suitability recommendations, and to highlight the special risks and characteristics of trading in the Notes. In particular, Nasdaq will advise members

Associate General Counsel, Office of General Counsel, Nasdaq, on November 16, 2004.

<sup>7</sup>Telephone conversation between Florence E. Harmon, Senior Special Counsel, Division of Market Regulation, Commission, and Alex Kogan, Associate General Counsel, Office of General Counsel, Nasdaq, on November 16, 2004.

<sup>8</sup>See Securities Exchange Act Release No. 32988 (Sept. 29, 1993), 58 FR 52124 (Oct. 6, 1993).

<sup>9</sup>Merrill Lynch satisfies this listing criterion.

<sup>10</sup>NASD Rule 4420(f)(2) requires issuers of securities designated pursuant to this paragraph to be listed on the Nasdaq National Market or the New York Stock Exchange, Inc., or be an affiliate of a company listed on the Nasdaq National Market or the New York Stock Exchange, Inc.; provided, however, that the provisions of NASD Rule 4450 will be applied to sovereign issuers of "other" securities on a case-by-case basis.

<sup>4</sup>As of August 31, 2004, the total market capitalization of the Index was \$953.34 billion.

recommending a transaction in the Notes to customers to have reasonable grounds for believing that the recommendation is suitable for such customer based on the facts, if any, disclosed by such customer of his or her other security holdings and of his or her financial situation and needs. In addition, pursuant to NASD Rule 2310(b), before executing a transaction in the Notes that has been recommended to a non-institutional customer, a member shall make reasonable efforts to obtain information concerning: (1) The customer's financial status; (2) the customer's tax status; (3) the customer's investment objectives; and (4) such other information used or considered to be reasonable by such member in making recommendations to the customer.

The Notes also 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, which is a continued listing requirement under NASD Rule 4310(c)(1). In addition, the Notes will be subject to the NASD's existing trading

halt rules.<sup>11</sup> Nasdaq will consider prohibiting the continued listing of the Notes if Merrill Lynch is not able to meet its obligations on the Notes.

#### Description of the Notes

The Notes are a series of senior non-convertible debt securities that will be issued by Merrill Lynch and will not be secured by collateral. The Notes will have a term to maturity of approximately fourteen months. The Notes will be issued in denominations of whole units ("Unit"), with each Unit representing a single Note. The initial public offering price will be \$10 per Unit. The Notes will not pay interest and are not subject to redemption by Merrill Lynch or at the option of any beneficial owner before maturity.

At maturity, if the value of the Index has increased, a beneficial owner will be entitled to receive a payment on the Notes based on triple the amount of that percentage increase, not to exceed a maximum payment per Unit (the "Capped Value") that is expected to be \$11.45. Thus, Nasdaq believes that the Notes provide investors the opportunity to obtain leveraged returns based on the Index subject to a cap that is expected to represent an appreciation of 14.5% over the original public offering price of

the Notes. Unlike ordinary debt securities, the Notes do not guarantee any return of principal at maturity. However, the Notes are not leveraged on the downside; rather, the value of the Notes declines on a one-to-one basis with the Index. Therefore, if the value of the Index has declined at maturity, a beneficial owner will lose some, and possibly all, of the original public offering price of \$10 per Unit.

The payment that a beneficial owner will be entitled to receive (the "Redemption Amount") depends entirely on the relation of the average of the values of the Index at the close of the market on five business days before the maturity of the Notes (the "Ending Value") and the closing value of the Index on the date the Notes are priced for initial sale to the public (the "Starting Value").

If the Ending Value is less than or equal to the Starting Value, the Redemption Amount per Unit will equal:

$$\$10 \times \left( \frac{\text{Ending Value}}{\text{Starting Value}} \right)$$

If the Ending Value is greater than the Starting Value, the Redemption Amount per Unit will equal:

$$\$10 + \left( \$30 \times \left( \frac{\text{Ending Value} - \text{Starting Value}}{\text{Starting Value}} \right) \right)$$

Provided, however, that the Redemption Amount cannot exceed the Capped Value.

The Notes are cash-settled in U.S. dollars and do not give the holder any right to receive a portfolio security, dividend payments, or any other ownership right or interest in the portfolio or index of securities comprising the Index. The Notes are designed for investors who want to participate or gain exposure to the Index, subject to a cap, and who are willing to forego market interest payments on the Notes during the term of the Notes. The Commission has previously approved the listing and trading of other securities in which the performance has been linked to the Index and to other Russell indexes.<sup>12</sup>

Since the Notes will be deemed equity securities for the purpose of NASD Rule 4420(f), the NASD and Nasdaq's existing equity trading rules will apply to the Notes. First, pursuant to NASD 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>13</sup> In addition, as previously described, 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. Furthermore, the Notes will be subject to the equity margin rules. Lastly, the regular equity trading hours of 9:30 a.m. to 4 p.m. will apply to transactions in the Notes.

Pursuant to Rule 10A-3 of the Act<sup>14</sup> and section 3 of the Sarbanes-Oxley Act of 2002,<sup>15</sup> Nasdaq will prohibit the initial or continued listing of any security of an issuer that is not in compliance with the requirements set forth therein.

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.

such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer.

<sup>14</sup> 17 CFR 240.10A-3.

<sup>15</sup> Pub. L. 107-204, 116 Stat. 745 (2002).

<sup>11</sup> See NASD Rule 4120.

<sup>12</sup> See, e.g., Securities Exchange Act Release Nos. 49388 (Mar. 10, 2004), 69 FR 12720 (Mar. 17, 2004) (File No. SR-CBOE-2003-51) (approving the listing and trading of options on three Russell indexes; order contains the list of twelve additional Russell indexes that were approved by the Commission at various times in the past for option listing and

trading); and 31382 (Oct. 30, 1992), 57 FR 52802 (Nov. 5, 1992) (File No. SR-CBOE-92-02) (approving the listing and trading of options on the Index).

<sup>13</sup> NASD 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

Merrill Lynch will deliver a prospectus in connection with the initial purchase of the Notes. The procedure for the delivery of a prospectus will be the same as Merrill Lynch's current procedure involving primary offerings.<sup>16</sup>

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,<sup>17</sup> in general, and with section 15A(b)(6) of the Act,<sup>18</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 the 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, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2004-132 on the subject line.

### *Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary,

Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-NASD-2004-132. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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, 450 Fifth Street, NW., Washington, DC 20549. Copies of the filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASD-2004-132 and should be submitted on or before December 21, 2004.

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

Nasdaq has asked the Commission to approve the proposal on an accelerated basis to accommodate the timetable for listing the Notes. After careful consideration, the Commission finds that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a registered securities association, and, in particular, with the requirements of section 15A(b)(6) of the Act,<sup>19</sup> in that it is designed 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.<sup>20</sup> The Commission believes that the Notes will provide investors with a means to participate in any percentage increase in the Index

that exists at the maturity of the Notes, subject to the Capped Value. Specifically, as described more fully above, if the value of the Russell 2000 Index has increased, a beneficial owner will be entitled to receive at maturity a payment on the Notes based on triple the amount of any percentage increase in the Index, not to exceed the Capped Value. The Commission notes that the effect of the Capped Value limits an investor in the Notes to an appreciation of 14.5% over the original offering price of the Notes.

The Commission notes that the Notes are non-principal protected instruments and are not leveraged on the downside. The Notes are debt instruments, the price of which will be derived from, and based upon, the value of the Russell 2000 Index. The Notes will not have a minimum principal amount that will be repaid at maturity, and accordingly, payment on the Notes at maturity may be less than the original issue price of the Notes. Accordingly, the Commission believes that 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. Because the final rate of return of the Notes is derivatively priced and based on the performance of the 2,000 stocks underlying the Russell 2000 Index, the Notes are instruments that do not guarantee a return of principal, and the return on the Notes is limited by the maximum payment at maturity, there are several issues regarding the trading of this type of product. However, for the reasons discussed below, the Commission believes that Nasdaq's proposal adequately addresses those concerns.

First, the Commission notes that the protections of NASD Rule 4420(f) were designed to address the concerns attendant to the trading of hybrid securities like the Notes. In particular, by imposing the hybrid listing standards, 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. Nasdaq states that it will distribute a circular to its membership calling attention to the specific risks associated with the Notes. Specifically, among other things, the circular will note that the Notes do not guarantee a total return of principal at maturity, that they are subject to maximum total payment at maturity, that the Notes do not pay interest, and that the Notes will provide exposure to the Index. Distribution of the circular should help to ensure that only customers with an understanding of the

<sup>16</sup> Telephone conversation between Alex Kogan, Associate General Counsel, Office of General Counsel, Nasdaq, and Richard Holley III, Attorney, Division of Market Regulation, Commission, on November 1, 2004.

<sup>17</sup> 15 U.S.C. 78o-3.

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

<sup>19</sup> 15 U.S.C. 78o-3(b)(6).

<sup>20</sup> In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

risks attendant to the trading of the Notes and who are able to bear the financial risks associated with transactions in the Notes will trade the Notes. Nasdaq also represents that Merrill Lynch will deliver a prospectus in connection with the initial sales of the Notes. In addition, Nasdaq has represented that it will incorporate and rely upon its existing surveillance procedures governing equity trading for the surveillance of the Notes, which includes surveillance on key pricing dates.

Second, the Commission believes that the listing and trading of the Notes should not unduly impact the market for the securities underlying the Index or raise manipulative concerns. In approving the product, the Commission recognizes that the Index is a capitalization-weighted stock index that is calculated, published, and disseminated by FRC that measures the composite price performance of the smallest 2,000 companies included in the Russell 3000 Index.<sup>21</sup> The Commission notes that the Index represents a broad cross-section of domestic small to mid-sized stocks, and no single industry group or stock dominates the Index. Only companies domiciled in the U.S. and its territories, which are listed and trade on the New York Stock Exchange, Inc., the American Stock Exchange, LLC, or Nasdaq, are eligible for inclusion in the Index. Changes in the composition of the Russell 2000 Index are made solely by FRC.

Nasdaq also represents that the primary criteria used to determine the initial list of securities eligible for the Russell 3000 Index is total market capitalization, and the Index is adjusted to reflect the reconstitution of the Russell 3000 Index for a given year. As of August 19, 2004, the market capitalization of the Index components ranged from approximately \$70 million to approximately \$3.92 billion. As of the same date, the Index's highest weighted component stock constituted approximately 0.195% of the Index's market capitalization, and the top five component stocks constituted approximately 0.956% of the Index's market capitalization. Nasdaq further states that the average daily trading volume of the average of Index components was approximately 195,000 shares. Given the composition of the

stocks underlying the Russell 2000 Index, the Commission believes that the listing and trading of the Notes that are linked to the Russell 2000 Index should not unduly impact the market for the underlying securities comprising the Russell 2000 Index or raise manipulative concerns.<sup>22</sup>

Third, 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 the NASD's listing standards in NASD Rule 4420(f), which provide that only issuers satisfying substantial asset and equity requirements may issue securities such as the Notes. In addition, the NASD's hybrid listing standards further require that the Notes have a market value of at least \$4 million. In any event, financial information regarding Merrill Lynch, in addition to the information on the 2000 stocks comprising the Russell 2000 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 could incur position exposure. However, as the Commission has concluded in previous approval orders for other hybrid instruments issued by broker-dealers,<sup>24</sup> the Commission believes that this concern is minimal given the size of the issuance of the Notes in relation to the net worth of Merrill Lynch.

Finally, the Commission notes that the value of the Russell 2000 Index will be widely disseminated at least once every 15 seconds throughout the trading day. Nasdaq has stated that it will delist the Notes in the event that the calculation and dissemination of the Index from a source independent of the issuer and Nasdaq is discontinued. The Commission believes that the availability of this disclosure is

<sup>22</sup> See also Securities Exchange Act Release No. 31382 (Oct. 30, 1992), 57 FR 52802 (Nov. 5, 1992) (File No. SR-CBOE-92-02) (classifying the Index as broad-based).

<sup>23</sup> See <http://www.russell.com/US/Indexes/US/Membership/default.asp>.

<sup>24</sup> See, e.g., Securities Exchange Act Release Nos. 50278 (Aug. 24, 2004), 69 FR 53751 (Sept. 2, 2004) (File No. SR-Amex-2004-64) (order approving the listing and trading of notes linked to the performance or the Standard & Poor's 500 Index); 49670 (May 7, 2004), 69 FR 27959 (May 17, 2004) (File No. SR-NASD-2001-68) (order approving the listing and trading of notes linked to the Nikkei 225 Index); 44913 (Oct. 9, 2001), 66 FR 52469 (Oct. 15, 2001) (File No. SR-NASD-2001-73) (order approving the listing and trading of notes whose return is based on the performance of the Nasdaq-100 Index); and 44483 (June 27, 2001), 66 FR 25677 (July 6, 2001) (File No. SR-Amex-2001-40) (order approving the listing and trading of notes whose return is based upon a portfolio of 20 securities selected from the Amex Institutional Index).

sufficient and should benefit investors in the product.

The Commission finds good cause for approving the proposed rule change, as amended, prior to the 30th day after the date of publication of notice of filing thereof in the **Federal Register**. The Commission believes that the Notes will provide investors with an additional investment choice and that accelerated approval of the proposal will allow investors to begin trading the Notes promptly. In addition, the Commission notes that it has previously approved the listing and trading of other derivative securities based on the Index<sup>25</sup> and securities with a structure similar to that of the Notes.<sup>26</sup> Accordingly, the Commission believes that there is good cause, consistent with sections 15A(b)(6) and 19(b)(2) of the Act,<sup>27</sup> to approve the proposal, as amended, on an accelerated basis.

## V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,<sup>28</sup> that the proposed rule change, as amended, (SR-NASD-2004-132) is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>29</sup>

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

[FR Doc. E4-3379 Filed 11-29-04; 8:45 am]

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<sup>25</sup> See Securities Exchange Act Release Nos. 46306 (Aug. 2, 2002), 67 FR 51916 (Aug. 9, 2002) (File No. SR-NYSE-2002-28) (approving the listing and trading of an exchange traded fund based on the Index); 32694 (July 29, 1993), 58 FR 41814 (Aug. 5, 1993) (File No. SR-CBOE-93-16) (approving the listing and trading of Flexible Exchange Options on the Index); 32693 (July 29, 1993), 58 FR 41817 (Aug. 5, 1993) (File No. SR-CBOE-93-15) (approving the listing and trading of QIX options on the Index); and 31382 (Oct. 30, 1992), 57 FR 52802 (Nov. 5, 1992) (File No. SR-CBOE-92-02) (approving the listing and trading of options on the Index).

<sup>26</sup> See Securities Exchange Act Release Nos. 49670 (May 7, 2004), 69 FR 27959 (May 17, 2004) (File No. SR-NASD-2004-068) (approving the listing and trading of notes linked to the Nikkei 225 Index); 47464 (Mar. 7, 2003), 68 FR 12116 (Mar. 13, 2003) (File No. SR-NASD-2003-22) (approving the listing and trading of Market Recovery Notes Linked to the S&P 500 Index); 47009 (Dec. 16, 2002), 67 FR 78540 (Dec. 24, 2002) (File No. SR-NASD-2002-175) (approving the listing and trading of Market Recovery Notes linked to the Nasdaq-100 Index); and 46883 (Nov. 21, 2002), 67 FR 71216 (Nov. 29, 2002) (File No. SR-Amex-2002-68) (approving the listing and trading of Market Recovery Notes linked to the Dow Jones Industrial Average).

<sup>27</sup> 15 U.S.C. 78o-3(b)(6) and 78s(b)(2).

<sup>28</sup> 15 U.S.C. 78s(b)(2).

<sup>29</sup> 17 CFR 200.30-3(a)(12).

<sup>21</sup> The Russell 3000 Index is composed of the 3,000 largest U.S. companies, based on market capitalization, and represents approximately 98% of the U.S. equity market. The Russell 2000 Index represented approximately 8% of the total market capitalization of the Russell 3000 Index as of August 31, 2004.