

P='9662'≤Thus, the proposed rule change does not impose any new transaction fees.

To preserve the CHX's competitive position with respect to MAX agency orders executed through a CHX floor broker, the Fee Schedule is also being amended to incorporate a monthly maximum transaction fee schedule for order-sending firms that meet certain monthly volume thresholds. The CHX believes that the proposed transaction fee schedule represents a reasonable balance between the need to maintain a competitive pricing structure and the need to assess a reasonable transaction fee when the assistance of a floor broker is required.<sup>9</sup> In addition, the CHX believes that the transaction fee maximums represent a reasonable allocation of transaction fees, chiefly because the maximums apply to benefit the order-sending firms that route significant levels of order flow to the CHX, which generates increased revenues for the CHX. The CHX also believes that the maximums are fair to all members because they are available to any order-sending firm that chooses to meet the volume thresholds.

As noted above, the Exchange is proposing to apply the Fee Schedule changes on a retroactive basis, to November 1, 2003. The Exchange believes that this relief is appropriate because during the months of November and December, the Exchange had noted a need for additional clarity regarding transaction fees for MAX agency orders executed through a CHX floor broker, and was engaged in an effort to draft appropriate Fee Schedule provisions for approval by the Exchange's Finance Committee and Board of Governors.<sup>10</sup> According to the Exchange, if the Fee Schedule amendments are applied, retroactively, to the months of November and December, 2003, there are Exchange order-sending member firms that would be eligible for a transaction fee credit. In addition, according to the Exchange the retroactive application of the Fee Schedule amendments would not result

qualify for the fee cap in (j), the proposed cap would prevent it from generating monthly charges sufficient to qualify for the fee reduction in (i).

<sup>9</sup>The Exchange is also proposing Section F.4(k) to the Fee Schedule to provide that the monthly transaction fee caps are not available to an order-sending firm that cancels a number of orders that exceeds 50% of the firm's CHX executions during the month. The CHX believes that this limitation is an appropriate means of deterring abusive cancellation practices; repetitive cancellations are extremely disruptive to floor members and to the CHX's automated systems.

<sup>10</sup>These provisions included the maximum transaction fee schedule for order-sending firms that meet certain monthly volume thresholds.

in the assessment of any additional fees against any CHX member.

## 2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with the provisions of Section 6(b) of the Act,<sup>11</sup> in general, and Section 6(b)(4) of the Act,<sup>12</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members.

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

The Exchange does not believe that the proposed rule change, as amended, will impose any burden on competition.

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

No written comments were either solicited or received with respect to the proposed rule change, as amended.

## 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 other 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 the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

## III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal, 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. Comments may also be submitted electronically at the following e-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-CHX-2004-01. The 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, comments

<sup>11</sup> 15 U.S.C. 78f(b).

<sup>12</sup> 15 U.S.C. 78f(b)(4).

should be sent in hardcopy or by e-mail but not by both methods. 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, 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 Exchange. All submissions should refer to the File No. SR-CHX-2004-01 and should be submitted by March 22, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 04-4509 Filed 2-27-04; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49306; File No. SR-NASD-2004-018]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. To Amend the Procedures for Review of Nasdaq Listing Determinations

February 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 January 28, 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 February 20, 2004, Nasdaq submitted Amendment No. 1 to the proposal,<sup>3</sup> which replaced the original proposal in its entirety. The Commission is publishing this notice to

<sup>13</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.

<sup>3</sup> See letter from Mary M. Dunbar, Vice President and Deputy General Counsel, Nasdaq, to Katherine A. England, Division of Market Regulation, Commission, dated February 20, 2004 ("Amendment No. 1").

solicit comments on the proposed rule change from interested persons.

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

Nasdaq is filing a proposed rule change to amend the procedures for review of listing determinations. Below is the text of the proposed rule change, as amended. Proposed new language is underlined; proposed deletions are in brackets.

\* \* \* \* \*

#### **4800. Procedures for Review of Nasdaq Listing Determinations**

##### **4830. The Listing Qualifications Panel**

(a)–(c) No change

(d) *If, following the hearing, the Listing Qualifications Panel cannot reach an unanimous decision regarding the matter under review, a Panel Decision shall not be issued and the issuer shall be notified of this circumstance. Thereafter, the issuer shall be provided an additional hearing before a Listing Qualifications Panel composed of three persons who did not participate in the previous hearing. The issuer may determine whether the hearing will be conducted based on the written record or an oral hearing, whether in person or by telephone. The issuer may submit any documents or other written material in support of its request for review, including any information not available at the time of the initial hearing before the Listing Qualifications Panel. There shall be no fee for the new hearing.*

##### **4845. Reconsideration by the Listing Qualifications Panel and the Listing and Hearing Review Council**

(a) *An issuer may request that the Listing Qualifications Panel reconsider a Panel Decision only upon the basis that a mistake of material fact existed at the time of the Panel Decision. The issuer's request shall be made within seven calendar days of the date of issuance of the Panel Decision. An issuer's request for reconsideration shall not stay a Listing Qualifications Panel delisting determination unless the Listing Qualifications Panel issues a written determination staying the delisting prior to the scheduled date for delisting. An issuer's request for reconsideration shall not toll the time period set forth in Rule 4840(b) for the issuer to initiate the Listing Council's review of the Panel Decision. If the Listing Qualifications Panel grants an issuer's reconsideration request, the Listing Qualifications Panel shall issue a modified decision within 15 calendar days following the issuance*

*of the original Panel Decision or lose jurisdiction over the matter. If the Listing Council calls a Panel Decision for review on the same issue that the issuer has requested reconsideration by the Listing Qualifications Panel, the Listing Council, in its discretion, may assert jurisdiction over the Panel Decision or may permit the Listing Qualifications Panel to proceed with the reconsideration.*

(b) *An issuer may request that the Listing Council reconsider a Listing Council Decision only upon the basis that a mistake of material fact existed at the time of the Listing Council Decision. The issuer's request shall be made within seven calendar days of the date of issuance of the Listing Council Decision. If the Listing Council grants an issuer's reconsideration request, the Listing Council shall issue a modified decision within 15 calendar days following the issuance of the original Listing Council Decision or lose jurisdiction over the matter.*

(c) *The Listing Qualifications Panel and the Listing Council may correct clerical or other non-substantive errors in their respective decisions either on their own motion or at the request of an issuer.*

##### **4880. Delivery of Documents**

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

\* \* \* \* \*

### **I. 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 IV below. Nasdaq has prepared

summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

##### **1. Purpose**

The purpose of the proposed rule change is to amend several of Nasdaq's procedures for review of listing determinations as described below.

##### **Listing Qualifications Panel Deadlocks**

NASD Rule 4840(a) requires that all Listings Qualifications Panel hearings be conducted by at least two persons designated by the Nasdaq Board of Directors. Nasdaq's practice is to conduct such hearings before Listing Qualifications Panels comprised of two members. Based on comments from Commission staff regarding the need for specific procedures to address a Listing Qualifications Panel deadlock, Nasdaq proposes to amend NASD Rule 4830 to address such situations.

Specifically, if the Listing Qualifications Panel is unable to agree on a Panel Decision, the issuer will be notified immediately and afforded the opportunity for a new hearing before an entirely new Listing Qualifications Panel comprised of three members. The issuer will have the opportunity to select whether the new hearing will be by written submission, telephone, or in person. All documents from the original record will be retained for the new Listing Qualifications Panel's consideration. In addition, the issuer and Nasdaq staff will be afforded the opportunity to supplement the record on review, including any information that was not available at the time of the first hearing before the Listing Qualifications Panel. There will be no additional fee for the new hearing before the Listing Qualifications Panel because such a fee would be inequitable to issuers as a Listing Qualifications Panel deadlock is not within an issuer's control.

##### **Reconsideration of Listing Qualifications Panel and Listing Council Decisions**

Nasdaq believes that, in certain situations, it is appropriate for the Listing Qualifications Panel or the Nasdaq Listing and Hearing Review Council ("Listing Council") to have an opportunity to reconsider their decision. Therefore, Nasdaq proposes to adopt a rule that sets forth the procedures and circumstances under which such reconsiderations can be made.

Nasdaq proposes to allow issuers to request that the Listing Qualifications Panel or the Listing Council reconsider a prior decision when there is a mistake of material fact in the decision. Under this standard, reconsideration would be appropriate only if the issuer can demonstrate that the original decision was based on the Listing Qualifications Panel or Listing Council's misunderstanding or lack of knowledge of a material fact that was in existence at the time of the decision. For example, reconsideration of a decision would be appropriate if the Listing Qualifications Panel delisted an issuer based on its failure to meet the shareholders' equity listing standard, not realizing that, prior to the decision, the issuer had increased its shareholders' equity by completing a private placement. Reconsideration of a Listing Qualifications Panel or Listing Council decision would not be granted for any material fact that occurs after the decision.

Under the proposed rule, issuers would be required to apply for reconsideration within seven calendar days of the date of issuance of the Listing Qualifications Panel or Listing Council decision. A request for reconsideration would not stay a Panel delisting determination, unless the Panel were to issue a written determination staying the delisting prior to the scheduled date for the delisting. Likewise, a request for reconsideration of a Panel Decision would not toll the 15-calendar-day period for appealing such a decision to the Listing Council that is set forth in NASD Rule 4840(b). As such, issuers that request reconsideration of a Panel Decision must also appeal the Panel Decision within the 15-day period provided in the Rule if they wish the Listing Council to review the decision.

In situations where reconsideration is granted by the Listing Qualifications Panel, a revised Panel Decision must be issued within 15 calendar days of the original Panel Decision. If the Listing Qualifications Panel does not issue a modified decision within that time period, the Listing Qualifications Panel will lose jurisdiction over the matter so that parallel proceedings with the Listing Council are avoided.<sup>4</sup>

Where reconsideration is granted by the Listing Council, a revised Listing

Council Decision must be issued within 15 calendar days of the original Listing Council Decision. If the Listing Council does not issue a modified decision within that time period, the Listing Council will lose jurisdiction over the matter so that parallel proceedings with the NASD Board are avoided.<sup>5</sup>

Lastly, Nasdaq proposes to allow both the Listing Qualifications Panel and the Listing Council to correct clerical and other non-substantive errors in a decision, either on their own initiative or at the request of an issuer.

#### *Delivery of Documents Via E-mail*

NASD Rule 4880 provides that the delivery of documents in connection with the review of listing determinations may be made by hand or by facsimile and overnight courier. Over the past several years, Nasdaq has received numerous requests from issuers to submit documents via e-mail as it is a more cost effective and expeditious form of delivery.

In response to such requests, Nasdaq proposes to amend Rule 4880 to include e-mail as an allowable method of service. Thus, issuers would have the option of delivering documents by hand, facsimile and overnight courier, or e-mail.<sup>6</sup> Nasdaq would continue to deliver documents to issuers only by facsimile and overnight delivery unless an issuer specifically consents to receive delivery by e-mail.

#### 2. Statutory Basis

Nasdaq believes that the proposed rule change, as amended, is consistent with the provisions of Section 15A(b)(6) of the Act<sup>7</sup> in that the proposal is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest. Nasdaq believes that the proposed rule change is designed to improve the procedures applicable to the review of listing determinations as well as to provide greater transparency to these procedures.

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

Nasdaq does not believe that the proposed rule change would result in any burden on competition that is not

necessary or appropriate in furtherance of the purposes of the Act.

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

Nasdaq neither solicited nor received written comments 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 self-regulatory organization consents, the Commission will:

(A) by order approve such proposed rule change; or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

#### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549-0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR-NASD-2004-018. The 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, comments should be sent in hardcopy or by e-mail but not by both methods. 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 Nasdaq. All submissions should refer to the File No.

<sup>4</sup> If the Listing Council has called a matter for review on the same issue that the issuer has requested reconsideration, the Listing Council can claim jurisdiction over the matter and there will be no further consideration of the issue by the Listing Qualifications Panel. Issuers do not have the ability to determine whether the Listing Qualifications Panel or the Listing Council has jurisdiction over a matter that has been called for review by the Listing Council.

<sup>5</sup> NASD Rule 4850 provides that the NASD Board may call a Listing Council Decision for review not later than the next NASD Board meeting that is 15 calendar days or more following the date of the Listing Council Decision.

<sup>6</sup> As with documents sent via facsimile and overnight courier, delivery of a document sent by e-mail would be considered timely under NASD Rule 4880 if it were sent prior to the relevant deadline.

<sup>7</sup> 15 U.S.C. 78o-3(b)(6).

SR-NASD-2004-018 and should be submitted by March 22, 2004.

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

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

[FR Doc. 04-4427 Filed 2-27-04; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49301; File No. SR-NASD-2004-030]

### Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to the Listing and Trading of 97% Protected Notes Linked to the Dow Jones Industrial Average

February 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 February 17, 2004, the National Association of Securities Dealers, Inc. (“NASD” or “Association”), through its subsidiary, The Nasdaq Stock Market, Inc. (“Nasdaq”), filed with the Securities and Exchange Commission (“Commission” or “SEC”) 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 is approving 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 97% Protected Notes Linked to the Performance of the Dow Jones Industrial Average (“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 IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

##### 1. Purpose

Nasdaq proposes to list and trade the Notes, the return on which is based upon the Dow Jones Industrial Average (“DJIA”) and for protection of 97% of the principal.<sup>3</sup>

Under NASD Rule 4420(f), Nasdaq may approve for listing and trading innovative securities that cannot be readily categorized under traditional listing guidelines.<sup>4</sup> Nasdaq proposes to list the Notes for trading under NASD Rule 4420(f).

##### Description of the Notes

The Notes are a series of senior non-convertible debt securities that will be

<sup>3</sup> The DJIA is a price-weighted index published by Dow Jones & Company, Inc. A component stock’s weight in the DJIA is based on its price per share rather than the total market capitalization of the issuer of that component stock. The DJIA is designed to provide an indication of the composite price performance of 30 common stocks of corporations representing a broad cross-section of U.S. industry. Nasdaq states that the corporations represented in the DJIA tend to be market leaders in their respective industries, and their stocks are typically widely held by individuals and institutional investors. The corporations currently represented in the DJIA are incorporated in the U.S. and its territories, and their stocks are traded on the New York Stock Exchange, Inc. (“NYSE”) and the Nasdaq. The component stocks in the DJIA are selected (and any changes are made) by the editors of the Wall Street Journal (“WSJ”). Changes to the stocks included in the DJIA tend to be made infrequently. Historically, most substitutions have been the result of mergers, but from time to time, changes may be made to achieve what the editors of the WSJ deem to be a more accurate representation of the broad market of the U.S. industry. As of February 12, 2004, the market capitalization of the securities included in the DJIA ranged from a high of \$329.3 billion to a low of \$8.4 billion. The average monthly trading volume for the last six months, as of the same date, ranged from a high of 24.6 million shares to a low of 3.0 million shares. The value of the DJIA is the sum of the primary market prices of each of the 30 common stocks included in the DJIA, divided by a divisor that is designed to provide a meaningful continuity in the value of the DJIA. In order to prevent certain distortions related to extrinsic factors, the divisor may be adjusted appropriately. The current divisor of the DJIA is published daily in the WSJ and other publications. Other statistics based on the DJIA may be found in a variety of publicly available sources. The value of the index is publicly disseminated every two seconds if the index value changes. Telephone conversation between Alex Kogan, Associate General Counsel, Nasdaq, and Florence E. Harmon, Senior Special Counsel, Division of Market Regulation (“Division”), Commission (February 20, 2004).

<sup>4</sup> See Securities Exchange Act Release No. 32988 (September 29, 1993), 58 FR 52124 (October 6, 1993), (“1993 Order”).

issued by Merrill Lynch and will not be secured by collateral. The Notes will rank equally with all of Merrill Lynch’s other unsecured and unsubordinated debt. The Notes will be issued in denominations of whole units (“Unit”), with each Unit representing a single Note. The original public offering price will be \$10 per Unit. The Notes will have a term to maturity of seven years. The Notes will not pay interest and are not subject to redemption either by Merrill Lynch or at the option of any beneficial owner before maturity.<sup>5</sup>

At maturity, a beneficial owner will be entitled to receive a payment on the Notes based on the value of the DJIA, but not less than \$9.70 per Unit (“Minimum Redemption Amount”). Thus, the Notes provide investors the opportunity to obtain returns based on the DJIA and they provide for the return of at least 97% of the principal amount per Unit.

Any payment that a beneficial owner may be entitled to receive in addition to the Minimum Redemption Amount (the “Supplemental Redemption Amount”) will depend entirely on: (a) The relation of the average of the values of the DJIA at the close of the market on five business days shortly before the maturity of the Notes (the “Ending Value”) and the closing value of the DJIA on the date the Notes are priced for initial sale to the public (the “Starting Value”), and (b) the Participation Rate, which will be a fixed value determined by Merrill Lynch on the date the Notes are priced for initial sale to the public and disclosed in the final prospectus supplement to be delivered in connection with sales of the Notes. The Participation Rate is expected to be between 1.00 and 1.15.<sup>6</sup>

#### The Supplemental Redemption Amount per Unit will equal:

<sup>5</sup> The actual maturity date will be determined on the day the Notes are priced for initial sale to the public.

<sup>6</sup> The Participation Rate is a fixed percentage expected to be between 100% and 115%. Merrill Lynch will determine the Participation Rate on the day the Notes are priced, and it will be disclosed in the Prospectus and Nasdaq’s circular to members, describing this product. The exact value of the Participation Rate will be determined at Merrill Lynch’s discretion. Merrill expects but does not guarantee that the Participation Rate will be between 100% and 115% of the interest rate on the Pricing Date. However, in no event, will the investor receive less than 97% of the principal amount per Unit at maturity. Telephone conversation between Alex Kogan, Associate General Counsel, Nasdaq, and Florence E. Harmon, Senior Special Counsel, Division, Commission (February 20, 2004).

<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.