

having a common investment adviser, common directors and/or common officers and the transaction must be for no consideration other than cash. Applicants state that the Funds may not be able to rely on rule 17a-7 when purchasing or selling portfolio securities to other Funds, and that the Investing Funds may not be able to rely on rule 17a-7 to effect in-kind purchases of shares of the Money Market Funds, because some of the Investing Funds may own more than 5% of the outstanding voting securities of a Money Market Fund and, therefore, an affiliation would not exist solely by reason of the transacting Funds having a common investment adviser, common directors and/or common officers. In addition, in-kind purchases of shares of a Money Market Fund by an Investing Fund would not meet the cash payment requirement of rule 17a-7(a).

11. Applicants request relief under sections 6(c) and 17(b) of the Act to permit the Interfund Transactions. Applicants submit that the requested relief satisfies the standards for relief in sections 6(c) and 17(b). Applicants state that, with respect to the Investing Funds' in-kind purchases of shares of the Money Market Funds, the consideration paid by the Investing Funds for shares of the Money Market Funds will be based on the net asset value of the Money Market Funds. With respect to the purchase and sale of portfolio securities between the Funds, applicants state that the price paid for the securities will be the current market price of the securities. Further, applicants state that the Interfund Transactions will comply with rule 17a-7 under the Act in all respects other than (i) the requirement that the parties to the transactions be affiliated persons (or affiliated persons of affiliated persons) of each other solely by reason of having a common investment adviser or investment advisers that are affiliated persons of each other, common officers and/or common directors, solely because the Investing Funds and the Money Market Funds might become affiliated persons within the meaning of sections 2(a)(3)(A) and (B) of the Act and (ii) the requirement that the transactions be for no consideration other than cash, solely because certain of the Interfund Transactions may be effected in shares of a Money Market Fund.

#### Applicants' Conditions

Applicants agree that the order granting the requested relief shall be subject to the following conditions:

1. Shares of the Money Market Funds sold to and redeemed by the Investing

Funds will not be subject to a sales load, redemption fee, distribution fee under a plan adopted in accordance with rule 12b-1 under the Act, or service fee (as defined in rule 2830(b)(9) of the Conduct Rules of the National Association of Securities Dealers).

2. No Money Market Fund will acquire securities of any other investment company in excess of the limits contained in section 12(d)(1)(A) of the Act.

3. Each of the Investing Funds will invest Uninvested Cash in, and hold shares of, the Money Market Funds only to the extent that such Investing Fund's aggregate investment of Uninvested Cash in all of the Money Market Funds does not exceed 25% of the Investing Fund's total assets. For purposes of this limitation, each Investing Fund or series thereof will be treated as a separate investment company.

4. Each Investing Fund and each Money Market Fund relying on the order will be advised by Russell or a Russell Adviser.

5. Investment by an Investing Fund in shares of a Money Market Fund will be in accordance with each Investing Fund's respective investment restrictions and will be consistent with each Investing Fund's policies as set forth in its prospectus and statement of additional information.

6. At or before the next meeting of a Board is held for the purpose of voting on an Advisory Agreement under section 15 of the Act, Russell or the Russell Adviser to the Investing Fund will provide the Board with specific information regarding the approximate cost to Russell or the Russell Adviser to the Investing Fund of, or portion of the advisory fee and any Collateral Investment Fee under the existing Advisory Agreement attributable to, managing the Cash Balances of the Investing Fund that can be expected to be invested in the Money Market Funds. In connection with approving any Advisory Agreement for an Investing Fund, the Board, including a majority of the Independent Trustees, shall consider to what extent, if any, the advisory fees and any Collateral Investment Fee charged to the Investing Fund by Russell or the Russell Adviser to the Investing Fund should be reduced to account for any change in the services provided to the Investing Fund by Russell or the Russell Adviser to the Investing Fund as a result of Cash Balances being invested in the Money Market Funds. The minute books of the Investing Fund will record fully the Board's consideration in approving the Advisory Agreement, including the considerations referred to above.

7. Before a Fund may participate in the Securities Lending Program, a majority of the Board (including a majority of the Independent Trustees) will approve the Fund's participation in the Securities Lending Program. No less frequently than annually, the Board also will evaluate, with respect to each Investing Fund, any securities lending arrangement and its results and determine that any investment of Cash Collateral in the Money Market Funds is in the best interests of the shareholders of the Investing Fund.

8. To engage in Interfund Transactions, the Investing Funds and Money Market Funds will comply with rule 17a-7 under the Act in all respects other than (i) the requirement that the parties to the transactions be affiliated persons (or affiliated persons of affiliated persons) of each other solely by reason of having a common investment adviser or investment advisers that are affiliated persons of each other, common officers and/or common directors, solely because the Investing Funds and the Money Market Funds might become affiliated persons within the meaning of sections 2(a)(3)(A) and (B) of the Act and (ii) the requirement that the transactions be for no consideration other than cash, solely because certain Interfund Transactions may be effected in shares of a Money Market Fund.

For the Commission, by the Division of Investment Management, under delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-45431; File No. SR-NASD-2002-16]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by the National Association of Securities Dealers, Inc. To Clarify the Income-Based Listing Standards of The Nasdaq Stock Market

February 11, 2002.

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 6, 2002, the National Association of Securities Dealers, Inc. ("NASD"),

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

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

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. Nasdaq has designated this proposed rule change as "non-controversial" pursuant to Rule 19b-4(f)(6) under the Act,<sup>3</sup> which renders it effective immediately upon filing. The Commission is publishing this notice to 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 with the Commission a proposed rule change to clarify Nasdaq's income-based listing standards. Text of the proposed rule change appears below. New language is italicized; deletions are bracketed.

\* \* \* \* \*

#### 4310. Qualification Requirements for Domestic and Canadian Securities

To qualify for inclusion in Nasdaq, a security of a domestic or Canadian issuer shall satisfy all applicable requirements contained in paragraphs (a) or (b), and (c) hereof.

(a)-(b) No change

(c) In addition to the requirements contained in paragraph (a) or (b) above, and unless otherwise indicated, a security shall satisfy the following criteria for inclusion in Nasdaq:

(1) No change

(2)(A) For initial inclusion, the issuer shall have:

(i)-(ii) No change.

(iii) net income *from continuing operations* of \$750,000 [(excluding extraordinary or non-recurring items)] in the most recently completed fiscal year or in two of the last three most recently completed fiscal years.

(B) For continued inclusion, the issuer shall maintain:

(i)-(ii) No change.

(iii) net income *from continuing operations* of \$500,000 [(excluding extraordinary or non-recurring items)] in the most recently completed fiscal year or in two of the last three most recently completed fiscal years.

\* \* \* \* \*

#### 4320. Qualification Requirements for Non-Canadian Foreign Securities and American Depositary Receipts

To qualify for inclusion in Nasdaq, a security of a non-Canadian foreign issuer, an American Depositary Receipt

(ADR) or similar security issued in respect of a security of a foreign issuer shall satisfy the requirements of paragraphs (a), (b) or (c), and (d) and (e) of this Rule.

(a)-(d) No change

(e) In addition to the requirements contained in paragraph (a), (b) or (c), and (d), the security shall satisfy the following criteria for inclusion in Nasdaq:

(1) No change

(2)(A) For initial inclusion, the issuer shall have:

(i) stockholders' equity of U.S. \$5 million;

(ii) No change

(iii) net income *from continuing operations* of U.S. \$750,000 [(excluding extraordinary or non-recurring items)] in the most recently completed fiscal year or in two of the last three most recently completed fiscal years.

(B) For continued inclusion, the issuer shall maintain:

(i) stockholders' equity of U.S. \$2.5 million;

(ii) No change

(iii) net income *from continuing operations* of U.S. \$500,000 [(excluding extraordinary or non-recurring items)] in the most recently completed fiscal year or in two of the last three most recently completed fiscal years.

\* \* \* \* \*

#### 4420. Quantitative Designation Criteria

In order to be designated for the Nasdaq National Market, an issuer shall be required to substantially meet the criteria set forth in paragraphs (a), (b), (c), (d), (e), (f), or (g) below. Initial Public Offerings substantially meeting such criteria are eligible for immediate inclusion in the Nasdaq National Market upon prior application and with the written consent of the managing underwriter that immediate inclusion is desired. All other qualifying issues, excepting special situations, are included on the next inclusion date established by Nasdaq.

(a) Entry Standard 1

(1) The issuer of the security had annual [pre-tax] income *from continuing operations before income taxes* of at least \$1,000,000 [(excluding extraordinary or non-recurring items)] in the most recently completed fiscal year or in two of the last three most recently completed fiscal years.

(2)-(7) No change

\* \* \* \* \*

### 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 provide greater transparency to Nasdaq's income-based listing standards. Nasdaq rules currently exclude non-recurring items from the income listing standards. These standards, however, lack transparency, as the term "non-recurring" is not defined in Generally Accepted Accounting Principles ("GAAP"). Since the intent of the income listing standards is to capture income from continuing operations, Nasdaq proposes to amend these standards to use the term "income from continuing operations" rather than to exclude non-recurring items. As defined under GAAP, the term "income from continuing operations" excludes discontinued operations, extraordinary items, and the cumulative effect from changes in accounting principles. Nasdaq believes that the proposed amendments to its initial and continued inclusion income listing standards will help to clarify these listing standards for issuers and investors.

The proposed rule change also clarifies that the equity listing standard for non-Canadian foreign securities and American Depositary Receipts is based on U.S. dollars.

##### 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act<sup>4</sup> in that it is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest. As previously noted, Nasdaq is proposing to amend the income-based listing standards to

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

<sup>4</sup> 15 U.S.C. 78o-3(b)(6).

provide greater clarity and transparency for issuers, their counsel, and investors.

#### *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*

Written comments were neither solicited nor received.

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

Nasdaq asserts that the proposed rule change is effective upon filing pursuant to section 19(b)(3)(A) of the Act<sup>5</sup> and paragraph (f)(6) of Rule 19b-4 thereunder,<sup>6</sup> because the proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.<sup>7</sup>

Nasdaq has requested that the Commission waive the 30 day pre-operative period, which would make the proposed rule operative immediately. The Commission finds that it is consistent with the protection of investors and the public interest to waive the 30-day pre-operative period in this case.<sup>8</sup> The Commission believes that the new rule will provide greater transparency to Nasdaq's listing standards, thereby reducing uncertainty for issuers and investors.

At any time within 60 days of this filing, the Commission may summarily abrogate this proposal if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors,

<sup>5</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>6</sup> 17 CFR 240.19b-4(f)(6).

<sup>7</sup> In addition, Rule 19b-4(f)(6) requires that the self-regulatory organization give the Commission five days' written notice of its intent to file the proposed rule change. The NASD, through Nasdaq, complied with this requirement. See e-mail from John Nachmann, Senior Attorney Nasdaq, to Florence Harmon, Senior Special Counsel, Division of Market Regulation, Commission, dated January 4, 2002.

<sup>8</sup> For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

or otherwise in furtherance of the purposes of the Act.

### **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. 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 No. SR-NASD-2002-16 and should be submitted by March 12, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-45429; File No. SR-NASD-2002-19]

### **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 Enhanced Return Notes Linked to the Nasdaq 100-Index**

February 11, 2002.

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 7, 2002, the National Association of Securities Dealers, Inc. ("NASD" or "Association") through its subsidiary, The Nasdaq Stock Market, Inc.

<sup>9</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.

("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 to approve the proposal on an accelerated basis.

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

Nasdaq proposes to list and trade Enhanced Return Notes Linked to the Nasdaq-100 Index (the "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**

Under NASD Rule 4420(f), "Other Securities," Nasdaq may approve for listing and trading innovative securities that cannot be categorized readily under traditional listing guidelines.<sup>3</sup> Nasdaq proposes to list for trading the Notes, as described below, under NASD Rule 4420(f).

##### **Description of the Notes**

The Notes<sup>4</sup> are a series of senior debt securities that will be issued by Merrill Lynch and will not be secured by collateral. The Notes will be issued in denominations of whole units ("Units"), with each Unit representing a single Note. The original public offering price will be \$10 per Unit. The Notes will not pay interest and are not subject to

<sup>3</sup> See Securities Exchange Act Release No. 32988 (September 29, 1993), 58 FR 52124 (October 6, 1993) (order approving File No. SR-NASD-93-15) ("1993 Order").

<sup>4</sup> For a detailed description of the Notes, including the risks associated with investing in the Notes, see the registration statement Merrill Lynch filed with the Commission (File No. 333-52822).