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For the Commission by the Division of Market Regulation, pursuant to delegated authority.⁷

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50712; File No. SR-FICC-2004-07]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Granting Approval of a Proposed Rule Change To Amend Its Rules To Eliminate the "Mortgage Banker" Category of Membership in Its Mortgage-Backed Securities Division

November 22, 2004.

I. Introduction

On March 25, 2004, the Fixed Income Clearing Corporation ("FICC") filed with the Securities and Exchange Commission ("Commission") and on June 21, 2004, and October 13, 2004, amended proposed rule change File No. SR-FICC-2004-07 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").¹ Notice of the proposed rule change was published in the *Federal Register* on October 20, 2004.² No comment letters were received. For the reasons discussed below, the Commission is now granting approval of the proposed rule change.

II. Description

The proposed rule change amends the rules of FICC's Mortgage-Backed Securities Division ("MBSD") to eliminate the "mortgage banker" category of membership. In accordance with Article III, Rule 1, Section 2, "Financial Requirements for Participants and Limited Purpose Participants," of MBSD's Rules, mortgage bankers are subject to a

minimum net worth requirement of \$5 million. With the exception of "brokers," all other applicants are subject to a minimum net worth or regulatory net capital requirement of \$10 million.³

Historically, mortgage bankers (which generally act as mortgage originators) maintained relatively little capital. FICC considered a lower minimum capital standard appropriate to enable and encourage these types of firms to participate in FICC. The mortgage banker category of membership is now becoming obsolete for two principal reasons. First, changes in the mortgage business are causing small originators to use Fannie Mae and Freddie Mac, making MBSD membership less desirable and therefore making the relatively lower minimum capital standard less justified. Second, from a membership administration perspective there appears to be no precise, uniform definition for "mortgage banker."⁴

The proposed rule change eliminates the mortgage banker category from the MBSD Rules. Entities that would have previously qualified as mortgage bankers will now be classified under the catch-all category of membership in Article III, Rule 1, Section 1, "Applicants Eligible to Become Participants or Limited Purpose Participants."⁵ This reclassification will increase the minimum net worth requirement from \$5 million to \$10 million for these members. FICC does not anticipate that this increase will adversely affect existing mortgage banker members because member financial statements filed with FICC indicate that each mortgage banker member's capitalization currently exceeds the new minimum.

III. Discussion

Section 17A(b)(3)(F) of the Act requires among other things that the

³ MBSD's Rules define "broker" as a member that is in the business of buying and selling securities as agent on behalf of dealers. Brokers are currently subject to a minimum net or liquid capital requirement of \$5 million.

⁴ Mortgage originators are state-regulated entities, and definitions of such entities vary with each state. Generally, these definitions target entities whose "primary" business is the issuance of mortgages. MBSD has historically classified entities as mortgage bankers based upon an applicant's representations made in its membership application and confirmed by management's review of the applicant's business.

⁵ Article III, Rule 1, Section 1(f) provides a catch-all category for membership for "firms in such other categories as the Corporation [FICC] from time to time may determine." The proposed rule change was amended to add language to Addendum A of the MBSD Rules to clarify that entities that are deemed to be mortgage bankers would be considered to be one of the various entity types that fall under the catch-all category of membership.

rules of a clearing agency be designed to assure the safeguarding of securities and funds in its custody or control or for which it is responsible.⁶ The Commission finds that FICC's proposed rule change is consistent with this requirement because by removing the mortgage banker category from the MBSD Rules and by providing that entities that currently are classified as such meet a higher minimum financial requirement, it enhances the ability of FICC to maintain a financially sound membership base without an adverse effect on itself or its members.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,⁷ that the proposed rule change (File No. SR-FICC-2004-07) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.⁸

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50710, File No. SR-NASD-2004-157]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to the Listing and Trading of Performance Leveraged Upside Securities Linked to the Russell 2000 Index

November 19, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 21, 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 and II

⁶ 15 U.S.C. 78q-1(b)(3)(F).

⁷ 15 U.S.C. 78s(b)(2).

⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² CFR 240.19b-4.

⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² Securities Exchange Act Release No. 50536 (October 13, 2004), 69 FR 61699.

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 Performance Leveraged Upside SecuritiesSM ("PLUS"), the return on which is based upon the Russell 2000 Index ("Notes") issued by Morgan Stanley.

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 proposed to list and trade the PLUS which provide for a return based upon the Russell 2000 Index (the "Index").

Index

The Index is a capitalization-weighted index maintained by Frank Russell company ("FRC").³ 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 industry groups. All 2,000 stocks are traded on the New York Stock Exchange, the American Stock Exchange, or Nasdaq and form a part of the Russell 3000 Index. 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 Index measures the price performance of the shares of common

stock of the smallest 2,000 companies included in the Russell 3000 Index, which represent approximately 8% of the total market capitalization of the Russell 3000 Index as of August 31, 2004.⁴ 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, 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. Real Estate Investment Trusts and Beneficial Trusts are eligible for inclusion, however. In general, only one class of securities 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 securities acts independent of the other.

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, the stock is deleted from the Index and will be replaced during 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 September 30, 2004, the market capitalization of the Index components ranged from approximately \$68 million to approximately \$2.353 billion. As of the same date, the Index's highest weighted component stock constituted approximately 0.213% of the Index's market capitalization, and the top five component stock constituted

approximately 0.9968% of the Index's market capitalization. For a 30-day period prior to August 19, 2004, the average daily trading volume of the average of all of the Index's components was approximately 195,000 shares.⁵

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 exchanged-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. In order to provide continuity for the Index's value, the divisor is adjusted periodically to reflect events including changes in the number of common shares outstanding for component stocks, company additions or deletions, corporate restructurings and other capitalization changes.

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 sources independent of the issuer and Nasdaq, such as numerous 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.⁶ In the event that the calculation and dissemination of the Index from an independent third-party source is discontinued, Nasdaq states that it will delist the Notes.⁷

⁵ Telephone conference between Alex Kogan, Associate General Counsel, Nasdaq, and Florence Harmon, Senior Special Counsel, Division of Market Regulation, ("Division"), Commission, dated November 16, 2004.

⁶ November 16, 2004 telephone conference between Alex Kogan, Associate General Counsel, Nasdaq, and Florence Harmon, Senior Special Counsel, Division, Commission.

⁷ November 16, 2004 telephone conference between Alex Kogan, Associate General Counsel, Nasdaq, and Florence Harmon, Senior Special Counsel, Division, Commission.

³ For additional information regarding the Index see <http://www.russell.com>.

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

Other Information

Under Rule 4420(f), Nasdaq may approve for listing and trading innovative securities that cannot be readily categorized under traditional listing guidelines.⁸ Nasdaq proposes to list and trade notes based on the Index under Rule 4420(f).

The Notes, which will be registered under Section 12 of the Act, will initially be subject to Nasdaq's listing criteria for other securities under Rule 4420(f). Specifically, under Rule 4420(f)(1):

(A) The issuer shall have assets in excess of \$100 million and

(B) stockholders' equity of at least \$10 million.⁹ In the case of an issuer which is unable to satisfy the income criteria set forth in Rule 4420(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;

(C) 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;

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

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

In addition, Morgan Stanley satisfies the listed marketplace requirement set forth in Rule 4420(f)(2).¹⁰ Lastly, pursuant to 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. 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 will be subject to Nasdaq's continued listing criterion for other securities pursuant to 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 Rule 4310(c)(1). The Notes will be subject to the NASD's existing trading halt rules. Nasdaq represents that it will consider prohibiting the continued listing of the Notes if Morgan Stanley is not able to meet its obligations on the Notes.

Description of the Notes

The Notes are a series of medium-term, senior non-convertible debt securities that will be issued by Morgan Stanley. The original public offering price of the Notes will be \$10 per PLUS. The Notes will not pay interest and are not subject to redemption by Morgan Stanley or at the option of any beneficial owner before maturity (approximately 1.25 years from the pricing date).

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 300% the amount of that percentage increase, subject to a maximum total payment at maturity that is expected to be between \$11.35 and \$11.65 per Note (the "Maximum Payment at Maturity").¹¹ Thus, 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 11.5% to 16.5% over the original issue price of the Notes. 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. Unlike ordinary debt securities, the Notes do not guarantee any return of principal at maturity. Therefore, if the value of the Index has declined from the time of pricing to the time of maturity, a beneficial owner will receive less, and

possibly significantly less, than the original issue price of \$10 per PLUS.

The payment that a beneficial owner will be entitled to receive at maturity depends entirely on the relation of the value of the Index generally on the second trading day prior to the date when the Notes are due (the "Final Index Value") and the value of the Index on the day they are priced for initial sale to the public (the "Initial Index Value"). If the Final Index Value is greater than the Initial Index Value, the payment at maturity per PLUS will equal the lesser of (a) \$10 plus the Leveraged Upside Payment¹² and (b) the Maximum Payment at Maturity. If the Final Index Value is less than or equal to the Initial Index Value, the payment at maturity per PLUS will equal \$10 times the Index Performance Factor.¹³

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 Commission has previously approved the listing of options on, and other securities the performance of which have been linked to or based on, the Index and to other Russell indexes.¹⁴

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.¹⁵ In

¹²The Leveraged Upside Payment is the product of (i) \$10 and (ii) 300% and (iii) the Index Percent Increase (a fraction, the numerator of which is the Final Index Value minus the Initial Index Value and the denominator of which is the Initial Index Value).

¹³The Index Performance Factor is a fraction, the numerator of which is the Final Index Value and the denominator of which is the Initial Index Value.

¹⁴See Securities Exchange Act Release No. 31382 (October 30, 1992), 57 FR 52802 (November 5, 1992) (SR-CBOE-92-02) (approving the listing and trading of options on the Index); Securities Exchange Act Release No. 49388 (March 10, 2004), 69 FR 12720 (March 17, 2004) (SR-CBOE-2003-51) (approving the listing and trading of options on 3 Russell indexes; order contains the list of 12 additional Russell indexes that were approved by the Commission at various times in the past for option listing and trading).

¹⁵As stated, prior to the execution of a transaction in the Notes that has been recommended to a non-institutional customer, Rule

⁸See Securities Exchange Act Release No. 32988 (September 29, 1993), 58 FR 52124 (October 6, 1993) (SR-NASD-93-15).

⁹Morgan Stanley satisfies this listing criterion.

¹⁰NASD 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 ("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.

¹¹The actual Maximum Payment at Maturity will be determined at the time of pricing of the Notes.

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.

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

Pursuant to Securities Exchange Act Rule 10A-3, 17 CFR 240.10A-3 and Section 3 of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002), 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.

Morgan Stanley 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 Morgan Stanley's current procedure involving primary offerings.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,¹⁶ in general, and with Section 15A(b)(6)¹⁷ of the Act, 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

^{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.

¹⁶ 15 U.S.C. 78o-3.

¹⁷ 15 U.S.C. 78o3(b)(6).

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. 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. Please include File Number SR-NASD-2004-157 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-2004-157. 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 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-2004-157 and should be submitted on or before December 20, 2004.

IV. Commission's Findings and Order Granting Accelerated Approval for 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 proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association, and, in particular, with the requirements of Section 15A(b)(6) of the Act,¹⁸ which requires in part that the rules be 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.¹⁹

The Notes are medium-term, senior non-convertible debt securities the return on which is based on the Index. The Notes, however, will not pay interest and are not subject to redemption by Morgan Stanley or at the option of any beneficial owner before maturity (approximately 1.25 years from the pricing date). Unlike ordinary debt securities, the Notes do not guarantee any return of principal at maturity. Therefore, if the value of the Index has declined from the time of pricing to the time of maturity, a beneficial owner will receive less, and possibly significantly less, than the original issue price of \$10 per PLUS. The Commission believes that the Notes provide investors with the opportunity to obtain upside leveraged returns based on the Index subject to a cap that is expected to represent an appreciation of 13.5% to 16.5% over the original issue price of the Notes. The Commission notes that the return of the Notes, if the Index declines, is not leveraged.

The Commission notes that issues are raised by the fact that the Notes are debt securities that do not guarantee a return of principal, that return on the Notes is limited by the Maximum Payment at maturity, and that the Final Index Value is derivatively priced and based on the performance value of an index of securities. As set forth below, the Commission believes that these concerns are adequately addressed by Nasdaq's proposals.

¹⁸ 15 U.S.C. 78o-3(b)(6).

¹⁹ In approving the proposed rule, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

First, the Commission notes that NASD Rule 4420(f) addresses the concerns stemming from the trading of hybrid securities such as the Notes. The Commission believes that the hybrid listing standards, suitability for recommendations standards²⁰ and compliance requirements will enable Nasdaq to address the potential problems that could arise from the hybrid nature of the Notes. The Commission notes that pursuant to Rule 4420(f)(3), prior to the commencement of trading on 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. 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 is expected to be between \$11.35 and \$11.65 per Note (the "Maximum Payment at Maturity"), that the Notes will 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 risks attendant to the trading of the Notes and who are able to bear the financial risks associated with the transactions in the Notes will trade the Notes. Nasdaq also represents that Morgan Stanley will deliver a prospectus in connection with the initial purchase of the Notes.

Second, the Commission notes that the final rate of return on the Notes depends in part upon the individual credit of the issuer, Morgan Stanley. To come extent this credit risk is minimized by NASD's listing standards in NASD Rule 4420(f), which provide that only issuers satisfying substantial asset and equity requirements may issue these types of hybrid securities. NASD's hybrid listing standards further require that the Notes have at least \$4 million in market value. In addition, financial information regarding Morgan Stanley will be publicly available.

Third, the Notes will be registered under Section 12 of the Act. NASD and Nasdaq's existing equity trading rules will apply to the Notes which will be subject to equity margin rules and will trade during the regular equity trading hours of 9:30 a.m. and 4 p.m. NASD

²⁰ Nasdaq will advise members recommending a transaction in the Notes to: (1) Determine that the transaction is suitable for a 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 involved in the transaction.

Regulation's surveillance procedures for the Notes will be the same as its current surveillance procedures for equity securities and will include additional monitoring on key pricing dates. The Commission believes that these rules and procedures will deter potential manipulation of the Notes.

Fourth, the Commission has a systematic concern that a broker-dealer, such as Morgan Stanley, or a subsidiary providing a hedge for the issuer will incur position exposure. As discussed in prior approval orders for other hybrid instruments issued by broker dealers,²¹ the Commission believes that this concern is minimal, given the size of the Notes issuance in relation to the net worth of Morgan Stanley.

Fifth, the Commission believes the general broad diversification, level of capitalization, and trading activity in the markets for the Index's component stocks minimize the potential for manipulation of the Index. The Index is a capitalization-weighted index maintained by 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 represent a wide range of industry groups. All 2,000 stocks are traded on the New York Stock Exchange, the American Stock Exchange, or Nasdaq and form a part of the Russell 3000 Index. As of August 31, 2004, the total market capitalization of the Index was \$953.34 billion and as of September 31, 2004, the market capitalization of the Index components ranged from approximately \$68 million to approximately \$2.353 billion. As of the same date, the Index's highest weighted component stock constituted approximately 0.213% of the Index's market capitalization and the top five component stocks constituted approximately 0.9968% of the Index's market capitalization. For a 30-day period prior to August 19, 2004, the average daily trading volume of the

²¹ See Securities and Exchange Act Release Nos. 44913 (October 9, 2001), 66 FR 52469 (October 15, 2001) (order approving File No. SR-NASD-2001-73) (approving the listing and trading of notes issued by Morgan Stanley Dean Witter & Co. whose return is based on the performance of the Index); 44483 (June 27, 2001), 66 FR 35677 (July 6, 2001) (order approving File No. SR-Amex-2001-40) (approving the listing and trading of notes issued by Merrill Lynch whose return is based on a portfolio of 20 securities selected by the Amex Institutional Index); and 37744 (September 27, 1996) (order approving File No. SR-Amex-96-27) (approving the listing and trading of notes issued by Merrill Lynch the return of which is based on a weighted portfolio of healthcare/biotechnology industry securities).

average of all of the Index's components was approximately 195,000 shares. The Commission notes that the overwhelming majority of the stocks that comprise the Index are not actively traded. The Commission also believes that the listing and trading of the Notes should not unduly impact the market for underlying securities comprising the Index. Finally, the Commission notes that the value of the Russell 2000 Index will be widely disseminated on a real-time basis (at least every 15 seconds) throughout the trading day. In the event that the calculation and dissemination of the index from an independent third-party source is discontinued, Nasdaq states that it will delist the Notes.

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 it has previously approved the listing of options on/ and or securities, the performance of which has been based on the Index.²² In addition, the Commission has previously approved the listing of securities with a structure that is the same or substantially the same as the Notes.²³ The Commission believes the Notes will provide investors with an additional investment choice and that the accelerated approval of the proposal will allow investors to begin trading the Notes promptly. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act for approving the proposed rule change prior to the thirtieth day after the date of publication in the **Federal Register**.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act²⁴ that the proposed rule change (SR-NASD-2004-

²² See Securities Exchange Act Release No. 31382 (October 30, 1992), 57 FR 52802 (November 5, 1992) (SR-CBOE-92-02) (approving the listing and trading of options on the Index); Securities Exchange Act Release No. 49388 (March 10, 2004), 69 FR 12720 (March 17, 2004) (SR-CBOE-2003-51) (approving the listing and trading of options on 3 Russell indexes; order contains the list of 12 additional Russell indexes that were approved by the Commission at various times in the past for option listing and trading).

²³ See Securities Exchange Act Release No. 50501 (October 7, 2004), 69 FR 61533 (October 19, 2004) (SR-NASD-2004-138) (approving the listing and trading of PLUS based on the value of the Dow Jones Euro Stoxx 50 Index); Securities Exchange Act Release No. 48065 (June 19, 2003), 68 FR 38414 (June 27, 2003) (SR-NASD-2003-100) (approving the listing and trading of PLUS based on the value of the Nasdaq-100).

²⁴ 15 U.S.C. 78s(b)(2).

157) is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁵

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50708; File No. SR-NSX-2004-06]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Stock Exchange To Amend Its By-Laws and Rules To Change the Designation of Its Board

November 19, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 19, 2004, the National Stock Exchange SM ("Exchange") 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 the Exchange. The Exchange filed the proposal pursuant to Section 19(b)(3)(A)(iii) of the Act³ and Rule 19b-4(f)(3) thereunder⁴ as being concerned solely with the administration of the Exchange, which renders the proposal effective upon filing with the Commission. 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

The Exchange proposes to amend its By-Laws and Rules to change all references to its governing board from the "Board of Trustees" to the "Board of Directors," and to change all references to each member of the governing board from "Trustee" to "Director." The text of the proposed rule change is available at the Office of the Secretary of the Exchange and at the Commission.

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

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

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

1. Purpose

The Exchange's By-Laws and Rules currently refer to the Exchange's governing board as the "Board of Trustees" and to each member of the governing board as a "Trustee." The Exchange proposes to change the name of its governing board to the "Board of Directors" and to change all references to each member of the governing board to "Director." Accordingly, the Exchange proposes to amend its By-Laws and Rules to reflect the change in nomenclature. The Exchange represents that this filing has no effect on the Exchange's governance structure and would not affect any of the operations of the Exchange.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)(1) of the Act⁵ in that it helps to assure that the Exchange is so organized and has the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

The Exchange represents that written comments were neither solicited nor received with respect to the proposed rule change.⁶

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

The proposed rule change has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act⁷ and Rule 19b-4(f)(3) thereunder⁸ because the proposed rule change is concerned solely with the administration of the Exchange. At any time within sixty (60) days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.⁹

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. Please include File Number SR-NSX-2004-06 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-NSX-2004-06. 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/>

⁶ See telephone conversation between Jennifer M. Lamie, Assistant General Counsel and Secretary, the Exchange, and Steve L. Kuan, Attorney, Division of Market Regulation, Commission, on October 27, 2004.

⁷ 15 U.S.C. 78s(b)(3)(A)(iii).

⁸ 17 CFR 240.19b-4(f)(3).

⁹ 15 U.S.C. 78s(b)(3)(C).

²⁵ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴ 17 CFR 240.19b-4(f)(3).

⁵ 15 U.S.C. 78f(b)(1).