

affect its obligation to be registered under section 12(g) of the Act.<sup>4</sup>

Any interested person may, on or before May 14, 2003, submit by letter to the Secretary of the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609, facts bearing upon whether the application has been made in accordance with the rules of the BSE and what terms, if any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>5</sup>

**Jonathan G. Katz,**  
Secretary.

[FR Doc. 03-10261 Filed 4-24-03; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

**FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT:** (65 FR 19240, April 18, 2003).

**STATUS:** Closed meeting.

**PLACE:** 450 Fifth Street, NW., Washington, DC.

**ANNOUNCEMENT OF ADDITIONAL MEETING:** Additional meeting.

A Closed Meeting will be held on Thursday, April 24, 2003 at 10:30 a.m. to continue discussion of agenda items from the Tuesday, April 22, 2003 Closed Meeting.

Commissioner Atkins, as duty officer, determined that no earlier notice thereof was possible.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matter will attend the Closed Meeting.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact the Office of the Secretary at (202) 942-7070.

Dated: April 23, 2003.

**Jonathan G. Katz,**  
Secretary.

[FR Doc. 03-10376 Filed 4-23-03; 12:20 am]

BILLING CODE 8010-01-U

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47704; File No. SR-NASD-2003-70]

### Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Listing and Trading of Market Recovery Notes Linked to the PHLX Semiconductor Sector

April 18, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 9, 2003, 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 Substance of the Proposed Rule Change

Nasdaq proposes to list and trade Market Recovery Notes<sup>SM</sup> Linked to the PHLX Semiconductor Sector<sup>SM</sup> ("Notes") issued by Merrill Lynch & Co., Inc. ("Merrill Lynch").

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

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. Nasdaq has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

##### 1. Purpose

Nasdaq proposes to list and trade notes, the return on which is based upon the PHLX Semiconductor Sector ("Index").<sup>3</sup>

##### Description of the Notes

The Notes are a series of senior non-convertible debt securities of Merrill Lynch that will not be secured by collateral. The Notes will have a term of not less than one and not more than ten years. The Notes will be issued in denomination of whole units ("Unit"), with each Unit representing a single Note. The original public offering price is expected to be \$10 per Unit. The Notes will not pay interest and are not subject to redemption by Merrill Lynch or at the option of any beneficial owner before maturity.<sup>4</sup>

At maturity, if the value of the Index has increased, a beneficial owner will be entitled to receive a payment on the Notes based on triple the amount of that percentage increase, not to exceed a maximum payment per Unit (the "Capped Value").<sup>5</sup> Thus, the Notes provide investors the opportunity to obtain leveraged returns based on 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 at maturity, a beneficial owner will receive less, and possibly significantly less, than the original public offering price of \$10 per Unit.<sup>6</sup>

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

If the Ending Value is less than or equal to the Starting Value, the

<sup>3</sup> The Commission's approval of the listing and trading of this product does not address whether a licensing agreement issue exists. See *In the Matter of the American Stock Exchange, Inc.*, Securities Exchange Act Release No. 42312 (January 4, 2000).

<sup>4</sup> The actual maturity date will be determined at the time on the day the Notes are priced for initial sale to the public.

<sup>5</sup> The actual Capped Value will be determined at the time of issuance of the Notes.

<sup>6</sup> Any amount the beneficial owner would receive at maturity (which is less than the original offering price) would correspond to any decline in the value of the Index.

<sup>4</sup> 15 U.S.C. 78l(g).

<sup>5</sup> 17 CFR 200.30-3(a)(1).

<sup>4</sup> 15 U.S.C. 78l(g).

<sup>5</sup> 17 CFR 200.30-3(a)(1).

Redemption Amount per Unit will equal:

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

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

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

provided, however, the Redemption Amount cannot exceed the Capped Value.

The Notes are cash-settled in U.S. dollars and do not give the holder any right to receive a portfolio security, dividend payments or any other ownership right or interest in the portfolio or index of securities comprising the Index. The Notes are designed for investors who want to participate or gain exposure to the Index, subject to a cap, and who are willing to forego market interest payments on the Notes during such term. The Commission has previously approved the listing of options on the Index.<sup>7</sup> The Commission has also previously approved the listing of securities with a structure identical to that of the Notes.<sup>8</sup>

The Index is currently composed of 17 U.S. companies primarily involved in the design, distribution, manufacture, and sale of semiconductors.<sup>9</sup> The Index was set to an initial value of 200 on December 1, 1993 and was split two-for-one on July 24, 1995. The Index is maintained by the Philadelphia Stock Exchange ("PHLX"). The PHLX may change the composition of the Index at any time, subject to compliance with the maintenance criteria discussed herein, to reflect the conditions in the

semiconductor industry. If it becomes necessary to replace a security in the Index, the PHLX will replace the security with a stock which the PHLX, in its discretion, believes would be compatible with the intended market character of the Index.<sup>10</sup> In making replacement determinations, the PHLX will also take into account a security's capitalization, liquidity, volatility, and name recognition of the proposed replacement. Further, securities may be replaced in the event of certain corporate events, such as takeovers or mergers that change the nature of the security. If, however, the PHLX determines to increase the number of Index component securities to greater than 21 or reduce the number of Index component securities to fewer than 11, the PHLX will submit a rule filing with the Commission pursuant to section 19(b) of the Act. In addition, in choosing replacement securities for the Index, the PHLX will be required to ensure that at least 90% of the weight of the Index continues to be made up of stocks that are eligible for standardized options trading.

The Index is a price-weighted index and reflects changes in the prices of the component securities relative to the Index's base date of December 1, 1993. Specifically, the Index value is calculated by adding the prices of the component stocks, dividing this summation by a divisor that is equal to the number of the components of the Index to get the average price, and multiplying the resulting number by 100. To maintain the continuity of the Index, the divisor will be adjusted to reflect non-market changes in the prices of the component securities as well as changes in the composition of the Index. Changes that may result in divisor adjustments include, but are not limited to, stock splits and dividends, spin-offs, certain rights issuances, and mergers and acquisitions.

As of March 24, 2003, the market capitalization of the portfolio of securities representing the Index ranged from a high of \$118.1 billion to a low of \$893.9 million. The average daily trading volume for the last six months, as of March 17, 2003, ranged from a high of 53.6 million shares to a low of 2.2 million shares.

Nasdaq states that, the PHLX has represented that the Index value will be updated at least once every 15 seconds during the trading day.<sup>11</sup> The updated Index values will be disseminated and displayed by means of primary market prints reported by the Consolidated Tape Association. Merrill Lynch also represented that it will maintain and disseminate the updated Index values every 15 seconds through a third-party provider if PHLX ceases to maintain and disseminate the updated Index values every 15 seconds.<sup>12</sup> If Merrill Lynch, however, fails to maintain and disseminate the updated Index values according to the above representation, Nasdaq represented that it will delist the Notes.<sup>13</sup>

Under NASD rule 4420(f), Nasdaq may approve for listing and trading innovative securities, which cannot be readily categorized under traditional listing guidelines.<sup>14</sup> Nasdaq proposes to list for trading notes based on the Index under NASD rule 4420(f).

#### Criteria for Initial and Continued Listing

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 NASD rule 4420(f). Specifically, under NASD rule 4420(f)(1):

(A) The issuer shall have assets in excess of \$100 million and stockholders' equity of at least \$10 million.<sup>15</sup> In the case of an issuer which is unable to satisfy the income criteria set forth in

<sup>7</sup> See Securities Exchange Act Release Nos. 38157 (January 10, 1997), 62 FR 2707 (January 17, 1997) (approving the listing and trading of European-style options on the Index); 34546 (August 4, 1994), 59 FR 43881 (August 18, 1994) (approving the listing and trading of options and long-term options on the Index).

<sup>8</sup> See Securities Exchange Act Release Nos. 47464 (March 7, 2003), 68 FR 12116 (March 13, 2003) (approving the listing and trading of Market Recovery Notes Linked to the S&P 500 Index); 47009 (December 16, 2002), 67 FR 78540 (December 24, 2002) (approving the listing and trading of Market Recovery Notes linked to the Nasdaq-100 Index); and 46883 (November 21, 2002), 67 FR 71216 (November 29, 2002) (approving the listing and trading of Market Recovery Notes linked to the Dow Jones Industrial Average).

<sup>9</sup> As of March 24, 2003, the portfolio of securities comprising the Index consisted of: Advanced Micro Devices, Inc.; Altera Corporation; Applied Materials, Inc.; Broadcom Corporation; Intel Corporation; KLA-Tencor Corporation; Lattice Semiconductor Corporation; Linear Technology Corporation; LSI Logic Corporation; Maxim Integrated Products, Inc.; Micron Technology, Inc.; Motorola, Inc.; National Semiconductor Corporation; Novellus Systems, Inc.; Teradyne, Inc.; Texas Instruments, Incorporated; and Xilinx, Inc.

<sup>10</sup> The PHLX has represented that any replacement or additional component securities will be listed and traded on either the New York Stock Exchange, Inc. ("NYSE"), the American Stock Exchange LLC ("Amex") or quoted on and traded through the Nasdaq National Market. See Securities Exchange Act Release No. 34546 (August 18, 1994), 59 FR 43881 (August 25, 1994) (SR-PHLX-94-02).

<sup>11</sup> *Id.*

<sup>12</sup> Telephone conversation between John D. Nachmann, Senior Attorney, Nasdaq, and Hong-Ahn Tran, Special Counsel, Division of Market Regulation ("Division"), Commission, on April 18, 2003.

<sup>13</sup> *Id.*

<sup>14</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), (the "1993 Order").

<sup>15</sup> Merrill Lynch satisfies this listing criterion.

paragraph (a)(1), Nasdaq generally will require the issuer to have the following: (i) assets in excess of \$200 million and stockholders' equity of at least \$10 million; or (ii) assets in excess of \$100 million and stockholders' equity of at least \$20 million;

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

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

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

In addition, Nasdaq states that Merrill Lynch satisfies the listed marketplace requirement set forth in NASD rule 4420(f)(2).<sup>16</sup> Lastly, pursuant to NASD rule 4420(f)(3), prior to the commencement of trading of the Notes, Nasdaq will distribute a circular to members providing guidance regarding compliance responsibilities and requirements, including suitability recommendations, and highlighting the special risks and characteristics of the Notes. In particular, Nasdaq will advise members recommending a transaction in the Notes to: (1) Determine that such transaction is suitable for the customer; and (2) have a reasonable basis for believing that the customer can evaluate the special characteristics of, and is able to bear the financial risks of, such transaction.

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

#### Rules Applicable to the Trading of the Notes

Since the Notes will be deemed equity securities for the purpose of NASD rule 4420(f), the NASD and Nasdaq's existing equity trading rules will apply to the

<sup>16</sup> NASD rule 4420(f)(2) requires issuers of securities designated pursuant to this paragraph to be listed on The Nasdaq National Market or the NYSE or be an affiliate of a company listed on The Nasdaq National Market or the NYSE; provided, however, that the provisions of NASD rule 4450 will be applied to sovereign issuers of "other" securities on a case-by-case basis.

Notes. First, pursuant to NASD rule 2310, "Recommendations to Customers (Suitability)" and NASD IM-2310-2, "Fair Dealing with Customers," NASD members must have reasonable grounds for believing that a recommendation to a customer regarding the purchase, sale or exchange of any security is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.<sup>17</sup> In addition, as previously mentioned, Nasdaq will distribute a circular to members and employees thereof providing guidance regarding compliance responsibilities and requirements, including suitability recommendations, and highlighting the special risks and characteristics of the Notes to, among other things, have a reasonable basis for believing that the customer can evaluate the special characteristics of, and is able to bear the financial risks of, such transaction. Second, the Notes will be subject to the equity margin rules. Lastly, the regular equity trading hours of 9:30 am to 4:00 pm will apply to transactions in the Notes.

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

#### 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 15A of the Act,<sup>18</sup> in general, and with section 15A(b)(6) of the Act,<sup>19</sup> in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

#### 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

<sup>17</sup> NASD rule 2310(b) requires members to make reasonable efforts to obtain information concerning a customer's financial status, a customer's tax status, the customer's investment objectives, and such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer.

<sup>18</sup> 15 U.S.C. 78o-3.

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

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. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to file number SR-NASD-2003-70 and should be submitted by May 16, 2003.

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

Nasdaq has asked the Commission to approve the proposal, on an accelerated basis to accommodate the timetable for listing the Notes. The Commission notes that it has previously approved the listing of options on, and securities the performance of which have been linked to or based on, the PHLX Semiconductor Index.<sup>20</sup> The Commission has also previously approved the listing of securities with a structure identical to that of the Notes.<sup>21</sup>

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<sup>22</sup> in that it is designed to promote just and

<sup>20</sup> See note 7, *supra*.

<sup>21</sup> See note 8, *supra*.

<sup>22</sup> 15 U.S.C. 78o-3(b)(6).

equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest.<sup>23</sup> The Commission believes that the Notes will provide investors with a means to participate in any percentage increase in the Index that exist at the maturity of the Notes, subject to the Capped Value.

Specifically, as described more fully above, if the value of the PHLX Semiconductor Sector Index has increased, a beneficial owner will be entitled to receive at maturity a payment of the Notes based on triple the amount of any percentage increase in the Index, not to exceed the Capped Value.

The Notes are leveraged debts instruments whose price will be derived from and based upon the value of the Index. In addition, as discussed more fully above, the Notes do not guarantee any return of principal at maturity. Thus, if the Index has declined at maturity, a beneficial owner may receive significantly less than the original public offering price of the Notes.<sup>24</sup> Accordingly, the level of risk involved in the purchase or sale of the Notes is similar to the risk involved in the purchase or sale of traditional common stock. Because the final rate of return on the Notes is derivatively priced and based upon the performance of an index of securities, because the Notes are debt instruments that do not guarantee a return of principal, and because investors' potential return is limited by the Capped Value, there are several issues regarding trading of this type of product. For the reasons discussed below, the Commission believes that Nasdaq's proposal adequately addresses the concerns raised by this type of product.

First, the Commission notes that the protections of NASD rule 4420(f) were designed to address the concerns attendant to the trading of hybrid securities like the Notes.<sup>25</sup> In particular, by imposing the hybrid listing standards, heightened suitability for recommendations,<sup>26</sup> and compliance requirements, noted above, the

Commission believes that Nasdaq has adequately addressed the potential problems that could arise from the hybrid nature of the Notes. The Commission notes that Nasdaq will distribute a circular to its membership that provides guidance regarding member firm compliance responsibilities and requirements, including suitability recommendations, and highlights the special risks and characteristics associated with the Notes. Specifically, among other things, the circular will indicate that the Notes do not guarantee any return of principal at maturity, that the maximum return on the Notes is limited to the Capped Value,<sup>27</sup> that the Notes will not pay interest, and that the Notes will provide exposure in 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 transactions in the Notes will trade 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, Merrill Lynch. To some extent this credit risk is minimized by the NASD's listing standards in NASD Rule 4420(f), which provide that only issuers satisfying substantial asset and equity requirements may issue these types of hybrid securities. In addition, the NASD's hybrid listing standards further require that the Notes have at least \$4 million in market value. Financial information regarding Merrill Lynch, in addition to information concerning the issuers of the securities comprising the Index, will be publicly available.<sup>28</sup>

Third, the Notes will be registered under section 12 of the Act. As noted above, the NASD's 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. to 4 p.m. NASD 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.<sup>29</sup>

Fourth, the Commission has a systemic concern that a broker-dealer, such as Merrill Lynch, or a subsidiary

providing a hedge for the issuer will incur position exposure. However, as the Commission has concluded in previous approval orders for the hybrid instruments issued by broker-dealers,<sup>30</sup> the Commission believes that this concern is minimal given the size of the Notes issuance in relation to the net worth of Merrill Lynch.

Finally, the Commission believes that the listing and trading of the proposed Notes should not unduly impact the market for the securities underlying the Index or raise manipulative concerns. In approving the product, the Commission recognizes that the Index is a price-weighted index currently composed of 17 U.S. companies listed on Nasdaq, the NYSE and the AMEX. The Commission notes that the Index is determined, composed, and calculated by PHLX. The Commission notes that Merrill Lynch will maintain and disseminate the updated Index values every 15 seconds through a third-party provider if PHLX ceases to do so. If Merrill Lynch, however, fails to maintain and disseminate the updated Index values, the Commission notes that Nasdaq will delist the Notes. As of March 24, 2003, the market capitalization of the portfolio of securities representing the Index ranged in capitalization from a high of \$118.1 billion to a low of \$893.3 million. In addition, the average trading volume for the last six months, as of March 17, 2003, ranged from a high of 53.6 million shares to a low of 2.2 million shares. Given the large capitalization, and liquid markets, the Commission continues to believe, as it has concluded previously, that the listing and trading of securities that are linked to the Index, should not unduly impact the market for the underlying securities comprising the Index or raise manipulative concerns. Moreover, the issuers of the underlying securities comprising the PHLX Semiconductor Sector Index, are subject to reporting requirements under the Act, and all of the component stocks are with listed on Nasdaq, the NYSE, or the Amex.

<sup>23</sup> 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).

<sup>24</sup> Any amount the beneficial owner would receive at maturity (which is less than the original offering price) would correspond to any decline in the value of the Index.

<sup>25</sup> See 1993 Order, *supra* note 14.

<sup>26</sup> As discussed above, Nasdaq will advise members recommending a transaction in the Notes to: (1) Determine that the 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, the transaction.

<sup>27</sup> The actual Capped Value will be determined at the time of issuance of the Notes.

<sup>28</sup> The companies comprising the Index are reporting companies under the Act.

<sup>29</sup> The Commission expects Nasdaq's surveillance procedures to address the inherent conflict of Merrill Lynch's position in the market at key pricing dates.

<sup>30</sup> See, e.g., Securities 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 from the Amex Institutional Index); and 37744 (September 27, 1996), 61 FR 52480 (October 7, 1996) (order approving File No. SR-Amex-96-27) (approving the listing and trading of notes issued by Merrill Lynch whose return is based on a weighted portfolio of healthcare/biotechnology industry securities).

The Commission finds good cause for approving the proposed rule change, prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The Commission believes that the Notes will provide investors with an additional investment choice and that accelerated approval of the proposal will allow investors to begin trading the Notes promptly. In addition, the Commission notes that it has previously approved the listing and trading of similar Notes and other hybrid securities based on the Index.<sup>31</sup> Accordingly, the Commission believes that there is good cause, consistent with sections (6)(b)(5) and 19(b)(2) of the Act,<sup>32</sup> to approve the proposal, on an accelerated basis.

## V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,<sup>33</sup> that the proposed rule change (SR-NASD-2003-70) is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>34</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. 03-10217 Filed 4-24-03; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47707; File No. SR-OCC-2002-04]

### Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change, as Amended, Relating to Money Market Funds as Margin Collateral

April 21, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on January 29, 2002, the Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") proposed rule change SR-OCC-2002-04. Notice of the proposal was published in the **Federal Register** on January 16, 2003.<sup>2</sup> No comment letters were received. The Commission granted approval of the

proposed rule change on March 31, 2003.<sup>3</sup>

OCC filed Amendment I to the proposed rule change on November 19, 2002. The changes made by Amendment I were inadvertently omitted from the notice and order approving the proposed rule change. Accordingly, the Commission is publishing this notice to solicit comments on Amendment I from interested persons.

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

Amendment I modified SR-OCC-2002-04 which expanded the acceptable forms of margin collateral to include shares of money market funds meeting specified criteria.

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

In its filing with the Commission, OCC 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. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.<sup>4</sup>

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

OCC filed Amendment I after discussions with its clearing members and fund issuers caused OCC to identify several areas in which SR-OCC-2002-04 needed to be clarified or modified. Amendment I made the following changes to SR-OCC-2002-04:

- Notification of Noncompliance with Requirements. SR-OCC-2002-04 as originally filed required a fund to immediately notify OCC of any noncompliance with the requirements of rule 604(b)(3)(i). Amendment I amended the filing to provide additional details as to when, to whom, and how such notice should be given. This additional detail will help ensure that OCC receives appropriate and timely notice of noncompliance in order to take such action as it deems necessary to respond to the event causing the noncompliance.

- Valuation of Deposited Shares. SR-OCC-2002-04 as originally filed

provided that money market fund shares would be valued at 98% of current net asset value unless a lower valuation was prescribed by OCC's Membership/Margin Committee. While the funds that will qualify for deposit under rule 604 are designed to maintain a stable net asset value of \$1.00, net asset value at any point in time may be slightly greater or less than \$1.00. Accordingly, OCC filed Amendment I to provide that deposited shares would be valued at 98% of current market value. In addition, Amendment I provided that OCC may prescribe a lower valuation in the event OCC receives notice from a fund that it no longer meets the qualification standards applicable to accept the fund's shares.

- Concentration Requirements. SR-OCC-2002-04 as originally filed required that no single registered shareholder have an interest of 10% or more in a fund. This standard was intended to limit the possibility that a redemption decision by a single shareholder could adversely affect the fund's ability to redeem shares in an orderly manner. Fund sponsors have advised OCC that this requirement may severely restrict their ability to construct a fund tailored to meet OCC's qualification standards as it requires a minimum of at least 10 registered shareholders before the fund meets OCC's eligibility standards. As a result, in Amendment I OCC revised its concentration restriction to provide that no more than 5% of the total number of outstanding shares of any one fund may be deposited by a single clearing member with OCC. OCC believes that this standard reasonably addresses concentration concerns because it limits OCC's exposure to a single fund on the default of the depositing clearing member.

- Compliance with CFTC Regulation 1.25. SR-OCC-2002-04 as originally filed required a fund to comply with CFTC Regulation 1.25, which sets forth the terms and conditions applicable to a futures commission merchant's or a derivatives clearing organization's investment of futures customer funds in permitted instruments. CFTC Regulation 1.25(c) specifies requirements for investments in money market mutual funds. This requirement was intended to ensure that shares in all approved funds could be deposited by clearing members registered as FCMs in their segregated futures account at OCC to the extent such shares were acquired with futures customer funds. CFTC Regulation 1.25(c), however, would not apply to money market fund shares deposited as margin for OCC accounts other than for segregated futures

<sup>31</sup> See note 8, *supra*.

<sup>32</sup> 15 U.S.C. 78o-3(b)(6) and 78s(b)(2).

<sup>33</sup> 15 U.S.C. 78s(b)(2).

<sup>34</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> Securities Exchange Act Release No. 47146 (January 9, 2003), 68 FR 2385.

<sup>3</sup> Securities Exchange Act Release No. 47599, 68 FR 16849 (April 7, 2003).

<sup>4</sup> The Commission has modified parts of these statements.