

Energy (6.0%), Financials (20.6%), Health Care (15.3%), Industrials (11.3%), Information Technology (14.4%), Materials (2.8%), Telecommunication Services (4.0%), and Utilities (2.8%).

Given the large diversification, capitalization, and relative percentage weightings of the companies included in each group of companies comprising the Index, the Commission continues to believe, as it has concluded previously, that the listing and trading of securities that are linked to the S&P 500 Index, should not unduly impact the market for the underlying securities comprising the S&P 500 Index or raise manipulative concerns.<sup>23</sup> As discussed more fully above, the Commission also believes that the relative percentage weightings of the ten groups of companies comprising the Index should ensure that no one stock or group of stocks significantly minimize the potential for manipulation of the Index. Moreover, the issuers of the underlying securities comprising the S&P 500 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. In addition, Nasdaq's surveillance procedures should serve to deter as well as detect any potential manipulation.

The Commission finds good cause for approving the proposed rule change, as amended, 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 S&P 500 Index.<sup>24</sup> Accordingly, the Commission believes that there is good cause, consistent with sections 15A(b)(6) and 19(b)(2) of the Act,<sup>25</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>26</sup> that the proposed rule change (SR-NASD-2003-22) is hereby approved on an accelerated basis.

<sup>23</sup> See note 7, *supra*.

<sup>24</sup> See note 13, *supra*.

<sup>25</sup> 15 U.S.C. 78o-3(b)(6) and 78s(b)(2).

<sup>26</sup> 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>27</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34-47459; File No. SR-NASD-2002-124]**

### **Self-Regulatory Organizations; Order Approving Proposed Rule Change, as Amended by Amendment No. 1 Thereto, by the National Association of Securities Dealers, Inc. Relating to Proposed Amendment to NASD Conduct Rule 2260 To Expand the Definition of "Designated Investment Adviser" To Include State Registered Investment Advisers for the Purpose of Receiving and Voting Proxy Materials on Behalf of Beneficial Owners**

March 6, 2003.

On September 19, 2002, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change to amend NASD Conduct Rule 2260 to expand the definition of "Designated Investment Adviser" to include state registered investment advisers for the purpose of receiving and voting proxy materials on behalf of beneficial owners. On January 8, 2003, the NASD submitted Amendment No. 1 to the proposed rule change.<sup>3</sup>

The Commission published the proposed rule change, as amended, for comment in the **Federal Register** on January 27, 2003.<sup>4</sup> The Commission received one comment letter relating to

<sup>27</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See letter from Kosha K. Dalal, Assistant General Counsel, Regulatory Policy and Oversight, NASD, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated January 8, 2003 ("Amendment No. 1"). In Amendment No. 1, the NASD proposed to (1) revise the first footnote of proposed NASD Conduct Rule 2260 to define the term "state" by reference to the Investment Advisers Act of 1940, instead of the Securities Exchange Act of 1934, and (2) underline the text of two proposed footnotes in proposed NASD Conduct Rule 2260 to indicate that they are proposed new text.

<sup>4</sup> See Securities Exchange Act Release No. 47214 (January 17, 2003), 68 FR 3915.

the proposal.<sup>5</sup> This order approves the amended proposal.

Currently, NASD Conduct Rule 2260 requires members to forward proxy material, annual reports, information statements and other material sent to security holders to the beneficial owner or the beneficial owner's "designated investment adviser." The rule defines a "designated investment adviser" as a person registered under the Investment Advisers Act of 1940 ("Advisers Act") who exercises investment discretion pursuant to an advisory contract for the beneficial owner and is designated in writing by the beneficial owner to receive proxy and related materials and vote the proxy, and to receive annual reports and other material sent to security holders. The NASD represents that when the National Securities Markets Improvement Act was passed in 1996, and certain state registered investment advisers were no longer required to be registered under the Advisers Act, NASD Conduct Rule 2260 was not updated to account for this change. As a result, under the current rule, beneficial owners cannot designate state registered investment advisers to receive proxy and other materials. The proposed rule change would expand the definition of "designated investment adviser" to include persons registered by a state as an investment adviser.

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association<sup>6</sup> and, in particular, the requirements of section 15A of the Act.<sup>7</sup> The Commission finds that the proposed rule change is consistent with section 15A(b)(6) of the Act,<sup>8</sup> which requires, among other things, that the rules of a national securities association be designed to promote just and equitable principles of trade and, in general, to protect investors and the public interest. The Commission believes that amending NASD Conduct Rule 2260 to expand the definition of "designated investment adviser" to include persons registered by a state as an investment adviser, would allow for the reasonable

<sup>5</sup> See letter from Christine A. Bruenn, NASSA President and Maine Securities Administrator, North American Securities Administrators Association, Inc. ("NASAA"), to Jonathan G. Katz, Secretary, Commission, dated February 18, 2003. In its comment letter, the NASAA expressed support for the proposal. See also *infra* note 9.

<sup>6</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>7</sup> 15 U.S.C. 78o-3.

<sup>8</sup> 15 U.S.C. 78o-3(b)(6).