

in any required submission to the Commission. Nasdaq anticipates requiring a minimum of 150,000 outstanding receipts before trading can commence.

In connection with continued listing and trading, and because the number of holders can be subject to substantial fluctuations depending on market conditions, Nasdaq believes that it would be inappropriate and burdensome on Trust Issued Receipt holders if Nasdaq considers suspending trading in or delisting a series of receipts with the consequent termination of the trust, unless the number of holders remains severely depressed over an extended time period. Therefore, Nasdaq will consider suspending or delisting a trust from trading when, in its opinion, further dealing in such securities appears unwarranted under the following circumstances:

(a) If the trust has more than sixty days remaining until termination and there have been fewer than fifty record and/or beneficial holders of the Trust Issued Receipts for the previous thirty or more consecutive trading days;

(b) If the aggregate number of Trust Issued Receipts outstanding is less than 50,000;

(c) If the aggregate market value of Trust Issued Receipts publicly held is less than \$1 million; or

(d) If such other event occurs or condition exists which, in the opinion of Nasdaq, makes further dealings on Nasdaq inadvisable.

Nasdaq will not, however, be required to suspend or delist from trading, based on the above factors, any Trust Issued Receipts for a period of one year after the initial listing of such Trust Issued Receipts for trading on Nasdaq. In addition, if the number of companies represented by the underlying securities drops to less than nine, and each time thereafter the number of companies is reduced, Nasdaq will consult with the Commission to confirm the appropriateness of continued listing of the Trust Issued Receipts.

Nasdaq Rule 4420(l) also contains specific "generic" listing criteria under which Nasdaq may commence trading Trust Issued Receipts pursuant to Rule 19b-4(e) under the Act. Those criteria are substantially similar to the criteria that have been applied to the initial listing of HOLDRs on the Amex. Specifically, each of the companies represented by the securities in the portfolios underlying the HOLDRs trusts (each of such companies referred to herein as a "component security") were required to meet the following minimum criteria when they were

selected: (1) Each component security common stock was registered under Section 12 of the Exchange Act; (2) the minimum public float of each component security was at least \$150 million; (3) each component security was either listed on a national securities exchange or be traded through the facilities of Nasdaq and a reported national market system security; (4) the average daily trading volume for each component security was at least 100,000 shares during the preceding sixty-day trading period; and (5) the average daily dollar value of the component security traded during the preceding sixty-day trading period was at least \$1 million. The initial weighting of each component security in the portfolio was based on its market capitalization, however, if on the date such weighting was determined, a component security represented more than 20% of the overall value of the receipt, then the amount of such security was to be reduced to no more than 20% of the receipt value.¹¹

Based on the fact that each of the HOLDRs was initially listed on the Amex, Nasdaq assumes that each component security met the criteria described above. Presently, however, Nasdaq represents that each of the HOLDRs that Nasdaq proposes to trade on an over-the-counter basis has one or more component securities that fail to meet the minimum criteria set forth above. As a result, while the HOLDRs are substantially in compliance with the aforementioned minimum standards, the HOLDRs do not satisfy Nasdaq's generic standards for listing and trading Trust Issued Receipts pursuant to Rule 19b-4(e). Specifically, as of November 25, 2002, Nasdaq represents that one or more component securities of each HOLDR do not meet the minimum public float requirement in clause (2) above, the average daily trading volume requirement in clause (4) above, and/or the average daily dollar value requirement in clause (5) above. These HOLDRs are more fully described in Exhibit 1 of the proposed rule change.¹²

Notwithstanding that fact, Nasdaq believes that its proposal to trade the

HOLDRs on an over-the-counter basis is appropriate, and thus should be approved. The HOLDRs continue to be substantially in compliance with the minimum initial listing criteria listed above, and thus, are substantially similar to the products previously approved by the Commission. These HOLDRs also continue to be traded on the Amex, the NYSE and several regional exchanges. Nasdaq believes that permitting it to trade these HOLDRs on an over-the-counter basis will afford investors the advantage of an additional market to trade the HOLDRs, and avoid the unfair discrimination against Nasdaq that would otherwise result from precluding Nasdaq from trading these securities while the aforementioned markets continue to do so.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,¹³ in general and with Section 15A(b)(6) of the Act,¹⁴ in particular, in that the proposed rule change is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. In particular, the HOLDRs provide investors with a convenient and less expensive way of participating in the securities markets. In addition, the HOLDRs provide investors with increased flexibility in satisfying their investment needs by allowing them to purchase and sell a single security replicating a broad portfolio of stocks at negotiated prices throughout the business day.

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 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,

¹¹ These criteria are also the same as the "generic" listing criteria set forth in NYSE Rule 1202.

¹² See Amendment No. 1, *supra* note 3 (providing an updated Exhibit 1). The following component securities are at issue: (1) Broadband: TERN, CMTN, and NXTV; (2) B2B Internet: QRSI, ICGE, CMRC, SQST, VERT, NXPS, and IMGX; (3) Europe 2001: TRLY, ARMHY, SNRA, BKHM, AUTN, IONA, and MICC; (4) Internet: CNET and INKT; (5) Internet Architecture: ROXI; (6) Internet Infrastructure: BVSX, EPNY, PRSF, VITR, AKAM, KANA, INKT, INAP, and NAVI; (7) Market 2000+: TM, BTY, and OOM; (8) Software: SAPE and NUAN; (9) Utilities: RRI; and (10) Wireless: AETH and NTRO.

¹³ 15 U.S.C. 78o-3.

¹⁴ 15 U.S.C. 78o-3(6).