

On June 23, 2003, the Exchange filed Amendment No. 1 to the proposed rule change.³ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, 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

The Exchange proposes to list and trade under section 107A of the Amex Company Guide ("Company Guide"), notes linked to the performance of the Amex Biotechnology Index (the "Biotech Index" or "Index").

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 Amex 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. The Amex 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

Under section 107A of the Company Guide, the Exchange may approve for listing and trading securities which cannot be readily categorized under the listing criteria for common and preferred stocks, bonds, debentures, or warrants.⁴ The Amex proposes to list for trading under section 107A of the Company Guide notes, the performance of which is linked to the Biotech Index (the "Accelerated Return Notes" or "Notes").⁵ The Biotech Index is determined, calculated and maintained solely by the Amex.⁶ The Notes will provide for a multiplier of any positive performance of the Index during such term subject to a maximum payment amount or ceiling.

The Notes will conform to the listing guidelines under section 107A⁷ and continued listing guidelines under sections 1001–1003⁸ of the Company Guide. The Notes are senior non-convertible debt securities of Merrill Lynch. The Notes will have a term of not less than one, nor more than ten years. Merrill Lynch will issue the Notes in denominations of whole units (a "Unit"), with each Unit representing a single Note. The original public offering price will be \$10 per Unit. The Notes

will entitle the owner at maturity to receive an amount based upon the percentage change of the Biotech Index. At maturity, if the value of the Index has increased over the term of the Notes, a beneficial owner will be entitled to receive a payment on the Notes equal to three (3) times the amount of that percentage increase, not to exceed a maximum payment (the "Capped Value") to be determined at the time of issuance of the Notes.⁹ The Notes will not have a minimum principal amount that will be repaid, and accordingly, payment on the Notes prior to or at maturity may be less than the original issue price of the Notes. Accordingly, the Notes are not "principal protected," and are fully exposed to any decline in the level of the Biotech Index.¹⁰ The Notes are also not callable by the Issuer.

The payment that a holder or investor of a Note will be entitled to receive (the "Redemption Amount") depends entirely on the relation of the average of the values of the Biotech Index at the close of the market on the five (5) business days shortly before the maturity of the Notes (the "Ending Value") and the closing value of the Biotech Index on the date the Notes are priced for initial sale to the public (the "Starting Value").

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

$$\$1,000 + \left[\$1,000 \times \left(\frac{\text{Final Level} - \text{Initial Level}}{\text{Initial Level}} \right) \right], \text{ subject to the Maximum Return Amount.}$$

³ See Letter from Jeffrey P. Burns, Associate General Counsel, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated June 20, 2003 ("Amendment No. 1"). In Amendment No. 1, the Exchange clarified its policy regarding the use of non-public information by employees. Employees involved in the selection and maintenance of the index are part of the marketing staff and are also covered by the insider trading prohibitions. Telephone conversation between Jeffrey P. Burns, Associate General Counsel, Amex, and Mia C. Zur, Attorney, Division of Market Regulation, Commission, on July 7, 2003.

⁴ See Securities Exchange Act Release No. 27753 (March 1, 1990), 55 FR 8626 (March 8, 1990) (order approving File No. SR-Amex-89-29).

⁵ Merrill Lynch & Co., Inc. ("Merrill Lynch") and the Amex have entered into a non-exclusive license agreement providing for the use of the Index by Merrill Lynch and certain affiliates and subsidiaries in connection with certain securities including these Notes. Amex is not responsible and will not participate in the issuance and creation of the Notes.

⁶ The Biotech Index is an equal dollar weighted index designed to measure the performance of a cross section of companies in the biotechnology industry that are primarily involved in the use of biological processes to develop products or provide

services. Such processes include, but are not limited to, recombinant DNA technology, molecular biology, genetic engineering, monoclonal antibody-based technology, lipid/liposome technology, and genomics. The Index was established with a benchmark value of 200.00 on October 18, 1991. The Index is rebalanced quarterly based on closing prices on the third Friday in January, April, July & October to ensure that each component stock continues to represent approximately equal weight in the Index. The securities included in the Biotech Index are listed on the Amex, New York Stock Exchange, Inc. ("NYSE") or traded through the Nasdaq Stock Market, Inc. ("Nasdaq").

⁷ The initial listing standards for the Notes require: (1) A minimum public distribution of one million units; (2) a minimum of 400 shareholders; (3) a market value of at least \$4 million; and (4) a term of at least one year. In addition, the listing guidelines provide that the issuer have assets in excess of \$100 million, stockholder's equity of at least \$10 million, and pre-tax income of at least \$750,000 in the last fiscal year or in two of the three prior fiscal years. In the case of an issuer which is unable to satisfy the earning criteria stated in section 101 of the Company Guide, the Exchange will require the issuer to have the following: (1) assets in excess of \$200 million and stockholders' equity of at least \$10 million; or (2) assets in excess of \$100 million and stockholders' equity of at least \$20 million.

⁸ The Exchange's continued listing guidelines are set forth in sections 1001 through 1003 of Part 10 to the Exchange's Company Guide. section 1002(b) of the Company Guide states that the Exchange will consider removing from listing any security where, in the opinion of the Exchange, it appears that the extent of public distribution or aggregate market value has become so reduced to make further dealings on the Exchange inadvisable. With respect to continued listing guidelines for distribution of the Notes, the Exchange will rely, in part, on the guidelines for bonds in Section 1003(b)(iv). Section 1003(b)(iv)(A) provides that the Exchange will normally consider suspending dealings in, or removing from the list, a security if the aggregate market value or the principal amount of bonds publicly held is less than \$400,000.

⁹ The capped value is expected to represent an appreciation of 16% to 20% over the original public offering price of the Notes. Thus, maximum payment is not expected to exceed between \$11.60 and \$12.00 per Note. See Merrill Lynch & Co., Inc., Accelerated Return Notes Linked to the Amex Biotechnology IndexSM, Preliminary Prospectus Supplement dated June 16, 2003.

¹⁰ A negative return of the Index will reduce the redemption amount at maturity with the potential that the holder of the Note could lose his entire investment.