

*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 S&P 500® Index ("Index").<sup>3</sup>

Under NASD Rule 4420(f), Nasdaq may approve for listing and trading innovative securities that cannot be readily categorized under traditional listing guidelines.<sup>4</sup> Nasdaq proposes to list for trading the, as described below, under NASD Rule 4420(f).

<sup>3</sup> The Index is published by Standard & Poor's, a division of The McGraw-Hill Companies, Inc. ("Standard & Poor's" or "S&P") and is intended to provide an indication of the pattern of common stock price movement. The Index is a capitalization-weighted index, with each stock's weight in the Index proportionate to its market value. The value of the Index is based on the relative value of the aggregate market value of the common stocks of 500 companies as of a particular time compared to the aggregate average market value of the common stocks of 500 similar companies during the base period of the years 1941 through 1943. The market value for the common stock of a company is the product of the market price per share of the common stock and the number of outstanding shares of common stock. As of August 29, 2003, 424 companies, or 83.6% of the market capitalization of the Index, traded on the New York Stock Exchange ("NYSE"); 74 companies, or 16.2% of the market capitalization of the Index, traded on Nasdaq; and 2 companies, or 0.2% of the market capitalization of the Index, traded on the American Stock Exchange ("AMEX"). As of August 29, 2003, the aggregate market value of the 500 companies included in the Index represented approximately 77% of the aggregate market value of stocks included in the Standard & Poor's Stock Guidance Database of domestic common stocks traded in the U.S., excluding American depository receipts, limited partnerships and mutual funds. Standard & Poor's chooses companies for inclusion in the Index with the aim of achieving a distribution by broad industry groupings that approximates the distribution of these groupings in the common stock population of the Standard & Poor's Stock Guide Database, which Standard & Poor's uses as an assumed model for the composition of the total market. Relevant criteria employed by Standard & Poor's include the viability of the particular company, the extent to which that company represents the industry group to which it is assigned, the extent to which the market price of that company's common stock is generally responsive to changes in the affairs of the respective industry and the market value and trading activity of the common stock of that company. Ten main groups of companies comprise the Index with the percentage weight of the companies included in each group indicated in parentheses: Consumer Discretionary (11.4%), Consumer Staples (11.4%), Energy (5.8%), Financials (20.5%), Health Care (13.6%), Industrials (10.8%), Information Technology (17.4%), Materials (2.9%), Telecommunication Services (3.5%), and Utilities (2.8%). Standard & Poor's may from time to time, in its sole discretion, add companies to, or delete companies from, the Index to achieve the objectives stated above.

<sup>4</sup> See Securities Exchange Act Release No. 32988 (September 29, 1993); 58 FR 52124 (October 6, 1993), ("1993 Order").

*Description of the Notes*

The Notes are a series of senior non-convertible debt securities that will be issued by Merrill Lynch and will not be secured by collateral. The Notes will have a term of not less than one and not more than four years. The Notes will be issued in denominations of whole units ("Unit"), with each Unit representing a single Note. The original public offering price will 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 in 2005.<sup>5</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") that is expected to be between \$11.60 and \$12.00.<sup>6</sup> 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 16% to 20% over the original public offering price of the Notes. 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>7</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 Redemption Amount per Unit will equal:

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

<sup>5</sup> The actual maturity date will be determined on the day the Notes are priced for initial sale to the public.

<sup>6</sup> The actual Capped Value will be determined at the time of issuance of the Notes.

<sup>7</sup> Any amount the beneficial owner would receive at maturity (which is less than the original offering price) would correspond to any decline in value of the Index. Telephone conversation between John D. Nachmann, Senior Attorney, Nasdaq, and Hong-Anh Tran, Special Counsel, Division of Market Regulation ("Division"), Commission, on October 15, 2003.

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, and securities the performance of which have been linked to or based on, the Index.<sup>8</sup>

*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>9</sup> In the case of an issuer which is unable to satisfy the income criteria set forth in 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;

<sup>8</sup> See Securities Exchange Act Release No. 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); Securities Exchange Act Release No. 30394 (February 21, 1992), 57 FR 7409 (March 2, 1992) (approving the listing and trading of a unit investment trust linked to the S&P 500® Index); Securities Exchange Act Release No. 27382 (October 26, 1989), 54 FR 45834 (October 31, 1989) (approving the listing and trading of Exchange Stock Portfolios based on the value of the S&P 500® Index); Securities Exchange Act Release No. 31591 (December 11, 1992), 57 FR 60253 (December 18, 1992) (approving the listing and trading of Portfolio Depository Receipts based on the S&P 500® Index); and Securities Exchange Act Release No. 19907 (June 24, 1983), 48 FR 30814 (July 5, 1983) (approving the listing and trading of options on the S&P 500® Index).

<sup>9</sup> Merrill Lynch satisfies this listing criterion.