

securities to and from their affiliates. The Companies and the investment advisers will carry out the Substitutions in conformity with the principal conditions of Rule 17a-7 and each Replaced Fund's and the Trust's procedures thereunder. Although the transaction may not be entirely for cash, with the exception of the substitution involving the PIMCO Fund and the High Yield Portfolio as described below, it will be effected based upon (i) the independent market price of the portfolio securities valued as specified in paragraph (b) of Rule 17a-7, and (ii) the net asset value per share of each Portfolio and the corresponding Replaced Fund valued in accordance with the procedures disclosed in the registration statements for each Fund and as required by Rule 22c-1 under the 1940 Act. No brokerage commission, fee, or other remuneration will be paid to any party in connection with the proposed transactions. In addition, the Trust Board will subsequently review the Substitutions and make the determinations required by paragraph (e)(3) of Rule 17a-7.

13. With regard to the substitution involving the PIMCO Fund and the High Yield Portfolio, DSI and the investment adviser to the PIMCO Fund and the investment sub-adviser to the High Yield Portfolio, PIMCO, intend to value securities selected for transfer between the two funds in a manner that is consistent with the current methodology used to calculate the daily net asset value of the PIMCO Fund. Currently, PIMCO employs certain third party, independent pricing services to value securities held by the PIMCO Fund ("vendor pricing"). DSI and PIMCO intend to employ vendor pricing to value securities held by the PIMCO Fund that are selected for transfer to the High-Yield Portfolio. Securities will be selected for transfer to the High Yield Portfolio on a pro-rata basis.

14. After the assets have been contributed to the Trust, responsibility for valuation of the securities held by the High Yield Portfolio will shift to the valuation committee of the Board of the Trust. At the end of the first trading following the transfer, the valuation agent and custodian for the Trust, the Bank of New York, will value the securities held by the High-Yield Portfolio. The foregoing notwithstanding, the Board of the Trust will retain ultimate responsibility for the valuation of the securities held by the High Yield Portfolio.

15. DSI and PIMCO believe that the use of neutral, third party vendor prices will ensure that both portfolios utilize unbiased evaluations in determining

respective security and, ultimately, portfolio market values. In the event that independent pricing services do not provide valuations for a specific security selected for transfer, DSI and PIMCO, in accordance with paragraph (b)(4) of Rule 17a-7 under the 40 Act, will rely on the "average of highest current independent bid and lowest current independent offer determined on the basis of reasonable inquiry * * *" in valuing such security.

16. The Substitutions are consistent with the general purposes of the 1940 Act, as enunciated in the Findings and Declaration of Policy in Section 1 of the 1940 Act. The proposed transactions do not present any of the issues or abuses that the 1940 Act is designed to prevent. Moreover, the proposed transactions will be effected in a manner consistent with the public interest and the protection of investors, as required by Section 6(c) of the 1940 Act. Contract owners will be fully informed of the terms of the Substitutions through the supplements and the Post-Substitution Notice and will have an opportunity to withdraw from the Replaced Fund through reallocation to another subaccount or otherwise terminate their interest thereof in accordance with the terms and conditions of their Contract prior to the Effective Date.

IV. Applicant's Conditions

For purposes of the approval sought pursuant to Section 26(c) of the Act, the substitutions described in the amended and restated application will not be completed, unless all of the following conditions are met:

1. The Commission shall have issued an order (i) approving the Substitutions under Section 26(c) of the 1940 Act; and (ii) exempting the in-kind redemptions from the provisions of Section 17(a) of the 1940 Act as necessary to carry out the transactions described in this Application.

2. Each affected Contract owner will have been sent a copy of (i) a supplement informing shareholders of this Application; (ii) a prospectus for the appropriate Trust Portfolio, and (iii) a second supplement setting forth the Effective Date and advising affected Contract owners of their right to reconsider the Substitutions and, if they so choose, any time prior to the Effective Date, they may reallocate or withdraw amounts under their affected Contract or otherwise terminate their interest thereof in accordance with the terms and conditions of their Contract. If affected Contract owners reallocate accumulation value prior to the Effective Date, or within 30 days after the Effective Date, there will be no

charge for the initial reallocation of accumulated value from each affected Subaccount and the initial reallocation will not be counted toward the total number of reallocations made within the Contract year for purposes of determining whether the number of reallocations which may be made without incurring administrative or transfer fees, if any, under the relevant Contract has been exceeded. The Companies will not exercise any right they may have under the Contracts to impose additional restrictions or fees on transfers from the Replaced Funds under the Contracts for a period of at least thirty days following the proposed substitutions.

3. The Companies shall have satisfied themselves, that (a) the Contracts allow the substitution of investment company shares in the manner contemplated by the Substitutions and related transactions described herein; (b) the transactions can be consummated as described in this Application under applicable insurance laws; and (c) that any regulatory requirements in each jurisdiction where the Contracts are qualified for sale, have been complied with to the extent necessary to complete the transactions.

Within five business days of the Effective Date of the Substitutions, the Applicants will forward to affected Contract owners a Post-Substitution Notice.

V. Conclusion

Applicants assert that, for the reasons summarized above, the requested order approving the Substitution and related transactions involving redemptions should be granted.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49548; File No. SR-Amex-2004-02]

Self Regulatory Organizations; Order Granting Approval to Proposed Rule Change and Amendment No. 1 by the American Stock Exchange LLC Relating to the Listing and Trading of Notes Linked to the Performance of the Select Utility Index

April 9, 2004.

On January 8, 2004, the American Stock Exchange LLC ("Amex" or

"Exchange"), filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to list and trade notes, the return on which is based upon a modified market capitalization-weighted portfolio of 20 dividend paying common stocks selected from the Standard & Poor's ("S&P") Utilities Sector, as reconstituted from time to time in the manner set forth in the Amex's proposal (the "Select Utility Index"). On February 12, 2004, the Exchange filed Amendment No. 1 to the proposed rule change.³

The proposed rule change was published for comment in the **Federal Register** on February 23, 2004.⁴ The Commission received no comments on the proposal.

Based on the description of the Notes, the Select Utility Index methodology, and the listing and trading criteria set forth in the Notice, 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 exchange⁵ and, in particular, the requirements of section 6 of the Act⁶ and the rules and regulations thereunder. The Commission finds specifically that the proposed rule change is consistent with section 6(b)(5) of the Act,⁷ which requires, among other things, that the rules of an exchange be designed to facilitate transactions in securities, 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 a national market system, and in general to protect investors and the public interest. The Commission believes that the Amex's proposal to list

and trade notes based on the Select Utility Index gives investors exposure to the dividend paying stocks in the S&P Utilities Sector and the ability to make additional unique investment choices in a manner consistent with the requirements of section 6(b)(5)⁸ of the Act.

As described in the Notice, at maturity, the holder of a Note will receive an amount based upon the percentage change of the Select Utility Index. The Notes will not have a minimum principal amount that will be repaid and, accordingly, payments on the Notes prior to or at maturity may be less than the original issue price of the Notes. The Notes are cash-settled in U.S. dollars and do not give the holders any right to receive a portfolio security or any other ownership right or interest in the portfolio of securities comprising the Select Utility Index. As described in the Notice, the Select Utility Index is initially constituted and reconstituted in a manner to reduce market impact and provide a better process for the Issuer to hedge its market risk in connection with the Notes. While the Exchange states that there will be limited change in the component stocks of the Select Utility Index, there may be significant changes in the weightings because the market capitalization weighting is adjusted so that no one component exceeds 10%. However, the Commission finds that this initial constitution and the quarterly reconstitutions are disclosed, and the process of constitutions and reconstitutions should help to alleviate both market impact and Issuer risk.

Subject to the criteria in the Prospectus for the Notes, the Amex has sole discretion regarding changes to the Select Utility Index due to reconstitutions and adjustments to the Index and the multipliers of the individual components. Thus, the Amex is determining, calculating, and selecting the component stocks of Index based on the 20 highest combined dividends scores on the relevant determination date. Amex represents that it maintains and enforces appropriate policies and trading restrictions that address the use of non-public information by its employees, such as non-public knowledge derived in the component selection and maintenance of the Select Utilities Index.

As of April 8, 2004, the market capitalization of the securities included in the Index ranged from a high of \$22 billion to a low of \$1 billion. The average daily trading volume for these same securities for the last six (6)

months ranged from a high of 564,568 shares to a low of 124,400 shares.⁹ Given that large trading volume and capitalization of the component securities underlying the Index, the Commission believes that the listing and trading of the Notes that are linked to the Select Utility Index should not unduly impact the market for the underlying securities or raise manipulative concerns. Moreover, the issuers of the underlying securities comprising the Select Utility Index, are subject to reporting requirements under the Act, and all of the component stocks are either listing or traded on, or traded through the facilities of, U.S. securities markets. In addition, the Exchange's equity margin and trading rules will apply to the Notes. The Commission also believes that the Exchange has appropriate surveillance procedures in place to detect and deter potential manipulation for similar index-lined products. By applying these procedures to the Notes, the Commission believes that the potential for manipulation of the underlying securities is minimal, thereby protecting investors and the public interest.

Furthermore, the Commission notes that the Notes are dependant upon the individual credit of the issuer, Merrill Lynch. To some extent this credit risk is minimized by the Exchange's listing standards in Section 107A of the Company Guide which provide that only issuers satisfying substantial asset and equity requirements may issue securities such as the Notes. In any event, financial information regarding Merrill Lynch, in addition to the information on the component stocks comprising the Index, will be publicly available.¹⁰

The Commission also has a systemic concern, however, 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 other hybrid instruments issued by broker-dealers,¹¹ the Commission believes that this concern is minimal given the size of the Notes issued in relation to the net worth of Merrill Lynch.

Finally, the Commission notes that the value of the Index will be

⁹ Telephone Conversation between Jeffrey P. Burns, Associate General Counsel, Amex, and Florence Harmon, Senior Special Counsel, Division, Commission, on April 8, 2004.

¹⁰ The Commission notes that the component stocks that comprise the Index are reporting companies under the Act, and the Notes will be registered under Section 12 of the Act.

¹¹ See Securities Exchange Act Release No. 47983 (June 4, 2003), 68 FR 5032 (June 11, 2003).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Letter from Jeffrey P. Burns, Associate General Counsel, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated February 11, 2004 ("Amendment No. 1"). In Amendment No. 1, the Amex clarified its earlier comparison of the Select Utility Index proposed herein with an existing index, the Select Sector Utilities Index. The Amex also included a representation that the Exchange would consult with the Commission in the event that the number of Index components falls to ten (10) or fewer stocks.

⁴ See Securities Exchange Act Release No. 49239 (February 12, 2004), 69 FR 8245 (February 23, 2004) ("Notice").

⁵ 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).

⁶ 15 U.S.C. 78f.

⁷ 15 U.S.C. 78f(b)(5).

⁸ *Id.*

disseminated at least once every fifteen seconds throughout the trading day. The Commission believes that providing access to the value of the Index at least once every fifteen seconds throughout the trading day is extremely important and will provide benefits to investors in the products.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,¹² that the proposed rule change (File No. SR-Amex-2004-02), as amended, be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04-8521 Filed 4-14-04; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49547; File No. SR-NASD-2004-046]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 thereto by National Association of Securities Dealers, Inc. Regarding SuperMontage Postable Auto-Ex Orders

April 9, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on March 16, 2004, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. On April 2, 2004, Nasdaq filed Amendment No. 1 to the proposal.³ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

Nasdaq proposes to modify the Auto-Ex Order of the Nasdaq National Market Execution System ("NNMS" or "SuperMontage"). Pursuant to section 19(b)(3)(A) of the Act⁴ and Rule 19b-4(f)(6) thereunder,⁵ Nasdaq has designated the proposed rule change as non-controversial. Nasdaq intends to implement the proposed rule change on or about May 17, 2004,⁶ and will inform market participants of the exact implementation date via a Head Trader Alert on <http://www.nasdaqtrader.com>.

The text of the proposed rule change is below. Proposed new language is italicized; proposed deletions are in brackets.⁷

4700. NASDAQ NATIONAL MARKET EXECUTION SYSTEM (NNMS)

4701. Definitions

Unless stated otherwise, the terms described below shall have the following meaning:

(a)-(jj) No change.

(kk) The term "Auto-Ex" shall mean, for orders in Nasdaq listed securities so designated, an order that *(except when it is displayed or interacts with a displayed Discretionary Order at a price in its discretionary price range)* will execute solely against the Quotes/Orders of NNMS Participants that participate in the automatic execution functionality of the NNMS and that do not charge a separate quote access fee to NNMS Participants accessing their Quotes/Orders through the NNMS. *An Auto-Ex Order may be designated as "Immediate or Cancel" (an "IOC Auto-Ex Order") or "Day" or "GTC" (a "Postable Auto-Ex Order"). An NNMS Participant entering a Postable Auto-Ex Order may (but is not required to) specify that the order will utilize the functionality associated with Discretionary Orders.*

(ll)-(nn) No change.

⁴ 15 U.S.C. 78s(b)(3)(A).

⁵ 17 C.F.R. 240.19b-4(f)(6).

⁶ See Amendment No. 1, *supra* note 3.

⁷ The text of the proposed rule change is shown as marked against the text of the SuperMontage rules as published in Exhibit A to Securities Exchange Act Release No. 49349 (March 2, 2004), 69 FR 10775 (March 8, 2004) (SR-NASD-2004-149). It should be noted, however, that such Exhibit A contained a minor technical error, in that it did not accurately reflect the text of Amendment Nos. 2 and 3 to SR-NASD-2003-143, as approved by the Commission in Securities Exchange Act Release No. 49020 (January 5, 2004), 69 FR 1769 (January 12, 2004) (SR-NASD-2003-143). Accordingly, this proposed rule change includes several additions and deletions to restore changes made through Amendment Nos. 2 and 3 to SR-NASD-2003-143. See Amendment No. 1, *supra* note 3.

(oo) Reserved.

(pp)-(uu) No change.

4706. Order Entry Parameters

(a) Non-Directed Orders—

(1) General. The following requirements shall apply to Non-Directed Orders Entered by NNMS [Market] Participants:

(A)-(B) No change.

(1)-(3) No change.

(4) Starting at 7:30 a.m., until the 4 p.m. market close, IOC and Day Non-Directed Orders may be entered into NNMS (or previously entered orders cancelled), but such orders entered prior to market open will not become available for execution until 9:30 a.m. Eastern Time. GTC orders may be entered (or previously entered GTC orders cancelled) between the hours 7:30 a.m. to 6:30 p.m. Eastern Time, but such orders entered prior to market open, or GTC orders carried over from previous trading days, will not become available for execution until 9:30 a.m. Eastern Time. Exception: For Nasdaq listed securities only, Non-Directed Day (other than Pegged, *Postable Auto-Ex*, and Discretionary Orders) and GTC orders (*other than Postable Auto-Ex Orders*) may be executed prior to market open if required under Rule 4710(b)(3)(B).

(5) [f]For Nasdaq listed securities, an order may be designated as "Auto-Ex," in which case the order *may* [will also automatically] be designated as IOC[,], *Day* or *GTC*. [An Auto-Ex Order will execute solely against the Quotes/Orders of NNMS Participants at the best bid/best offer that participate in the automatic execution functionality of the NNMS and that do not charge a separate quote-access fee to NNMS Participants accessing their Quotes/Orders through the NNMS.] *If an NNMS Participant entering a Postable Auto-Ex Order specifies that the order will utilize the functionality associated with Discretionary Orders, the order will automatically be designated as Day.*

(6)-(12) No change.

(C)-(E) No change.

(F) An NNMS [Market] Participant may enter a Non-Directed

Order that is either a market order or a limit order prior to the market's open. Market orders and limit orders designated as Immediate or Cancel, [and] limit orders designated as Total Immediate or Cancel, *Auto-Ex Orders*, and Discretionary Orders whose displayed price or discretionary price range would lock or cross another Quote/Order if they were displayed orders shall be held in a time-priority queue that will begin to be processed by

¹² 15 U.S.C. 78s(b)(2).

¹³ 17 CFR 200.30-3(a)(12).

¹⁴ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from John M. Yetter, Associate General Counsel, Nasdaq, to, Katherine England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated April 1, 2004 ("Amendment No. 1"). In Amendment No. 1, Nasdaq clarified certain aspects of the description, proposed implementation date, and the rule text of the proposed rule change.