

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44913; File No. SR-NASD-2001-73]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Listing and Trading of Performance Leveraged Upside Securities ("PLUS")

October 9, 2001.

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 October 9, 2001, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons. For the reasons discussed below, the Commission is granting accelerated approval to the proposed rule change.

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

Nasdaq proposes to list and trade medium-term notes issued by Morgan Stanley Dean Witter & Co. ("Morgan Stanley"), referred to as the PLUS, the return on which is based upon the performance of the Nasdaq-100 Index.

II. Self-Regulatory Organization's Statements of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq 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. Nasdaq 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

Under NASD Marketplace rule 4420(f), Nasdaq 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.³ Nasdaq proposes to list for trading the PLUS, as described below, under NASD Marketplace Rule 4420(f).

Description of the PLUS⁴

The PLUS are medium-term notes that will be issued by Morgan Stanley. The principal amount and issue price of each PLUS will be equal to one-eighth of the closing value of the Nasdaq-100 Index⁵ on the day that the PLUS are offered for initial sale to the public. The PLUS will pay interest quarterly beginning on December 30, 2001. The interest rate approximates the current dividend yield on the Nasdaq-100 Index and will not be adjusted up or down over the life of the PLUS. The PLUS will expire on December 30, 2004.

At maturity, unless Morgan Stanley has called the PLUS, investors will

³ See Securities Exchange Act Release No. 32988 (September 29, 1993), 58 FR 52124 (October 6, 1993).

⁴ For a detailed description of the PLUS, including the risks associated with investing in the PLUS, see the registration statement filed by Morgan Stanley with the Commission (File No. 333-47576).

⁵ The Nasdaq-100 Index is a modified capitalization-weighted index of 100 of the largest non-financial companies listed on The Nasdaq National Market tier of Nasdaq. The Nasdaq-100 Index constitutes a broadly diversified segment of the largest and most actively traded securities listed on Nasdaq and includes companies across a variety of major industry groups. In order to limit domination of the Nasdaq-100 Index by a few large stocks, the Nasdaq-100 Index is calculated under a "modified capitalization-weighted" methodology. This capitalization weight distribution is evaluated on a quarterly basis and is rebalanced, if either one or both of the following two weight distribution requirements are not met: (1) the current weight of the single largest market capitalization Nasdaq-100 Index component security must be less than or equal to 24.0%, and (2) the "collective weight" of those Nasdaq-100 Index component securities whose individual current weights are in excess of 4.5%, when added together, must be less than or equal to 48.0%. Nasdaq-100 Index securities are ranked by market value and are evaluated annually to determine which securities will be included in the Nasdaq-100 Index. Moreover, if at any time during the year a Nasdaq-100 Index security is not longer trading on Nasdaq, or is otherwise determined by Nasdaq to become ineligible for continued inclusion in the Nasdaq-100 Index, the security will be replaced with the largest market capitalization security not currently in the Nasdaq-100 Index that meets the Nasdaq-100 Index eligibility criteria. For a detailed description on the Nasdaq-100 Index, see the registration statement filed by Morgan Stanley with the Commission (File No. 333-47576).

receive in exchange for the principal amount of each PLUS an amount in cash equal to one-eighth of the final average index value, plus a supplemental amount in cash equal to one-eighth of the amount, if any, by which the final average index value exceeds the closing value of the Nasdaq-100 Index on the day the PLUS is offered for initial sale to the public. The final average index value will be the average closing value of the Nasdaq-100 Index over a period of five trading days commencing on December 15, 2004. In no event will the supplemental amount be less than zero.

The return that investors realize on the PLUS is limited by Morgan Stanley's call right. Morgan Stanley has the right to call all of the PLUS at any time beginning in October 2003, including at maturity, for an amount in cash equal to the call price, which will be the equivalent to a percentage of the issue price of the PLUS. If Morgan Stanley calls the PLUS, it will send a notice announcing that it has decided to call the PLUS and specify in the notice a call date when investors will receive the cash call price in exchange for delivering the PLUS to the trustee. The call date will not be less than 15 nor more than 30 days after the date of the notice. If Morgan Stanley calls the PLUS, investors will not be entitled to receive accrued but unpaid interest on the PLUS on the call date.

Unlike ordinary debt securities, the PLUS do not guarantee any return of principal at maturity. If the average closing value of the Nasdaq-100 Index at maturity is less than the closing value of the Nasdaq-100 Index on the day that the PLUS are offered for initial sale to the public and Morgan Stanley has not called the PLUS, Morgan Stanley will pay an amount in cash that is less than the issue price of the PLUS.

Criteria for Initial and Continued Listing

The PLUS will be subject to Nasdaq's initial listing criteria for other securities under NASD Marketplace Rule 4420(f). Specifically:

- (i) The issuer will have assets in excess of \$100 million and stockholders' equity of at least \$10 million. In the case where the issuer is unable to satisfy the \$1 million annual pre-tax income requirement of NASD Marketplace Rule 4420(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;
- (ii) There will be at least 400 holders of the PLUS;

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

(iii) There will be a minimum public distribution of 1 million trading units; and

(iv) The aggregate market value/principal amount of the PLUS will be at least \$4 million.

In addition, Morgan Stanley satisfies the listed marketplace requirement set forth in NASD Marketplace 4420(f)(2). Prior to the commencement of trading of the PLUS, Nasdaq will distribute a circular to the membership providing guidance regarding member firm compliance responsibilities and requirements when handling transactions in the PLUS.

The PLUS will be subject to Nasdaq's continued listing criteria for other securities pursuant to NASD Marketplace Rule 4450(c). Under this criteria, the aggregate market value or principal amount of publicly-held units must be at least \$1 million.

Pursuant to NASD Marketplace Rule 4310(c)(23)(A), the PLUS will have a CUSIP number identifying the securities included in the file of eligible issues maintained by a securities depository registered as a clearing agency under Section 17A of the Act ("securities depository" or "securities depositories"), in accordance with the rules and procedures of such securities depository; except that this provision of the rule shall not apply to a security if the terms of the security do not and cannot be reasonably modified to meet the criteria for depository eligibility at all securities depositories.

Under NASD Marketplace Rule 4310(c)(23)(B), a security depository's inclusion of a CUSIP number identifying a security in its file of eligible issues does not render the security "depository eligible" under NASD Marketplace Rule 11310 until: (i) in the case of any new issue distributed by an underwriting syndicate on or after the date a securities depository system for monitoring repurchases of distributed shares by the underwriting syndicate is available, the date of the commencement of trading in such security on Nasdaq; or (ii) in the case of any new issue distributed by an underwriting syndicate prior to the date a securities depository system for monitoring repurchases of distributed shares by the underwriting syndicate is available where the managing underwriter elects not to deposit the securities on the date of the commencement of trading in such security on Nasdaq, such later date designated by the managing underwriter in a notification submitted to the securities depository; but in no event more than three months after the

commencement of trading in such security on Nasdaq.

In addition, the PLUS will be registered under Section 12 of the Act. Rules Applicable to the Trading of the PLUS

Since the PLUS will be deemed equity securities for the purpose of NASD Marketplace Rule 4420(f), the NASD and Nasdaq's existing equity trading rules will apply to the trading of the PLUS. First, pursuant to NASD Marketplace Rule 2310 and IM-2310-2, NASD members must have reasonable grounds for believing that a recommendation to a customer regarding the purchase, sale or exchange of any security is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.⁶ Second, the PLUS will be subject to the equity margin rules. Third, the regular equity trading hours of 9:30 am to 4:00 pm will apply to transactions in the PLUS. Lastly, NASD Regulation's surveillance procedures for the PLUS will be the same as the current surveillance procedures governing equity securities, and will include additional monitoring on key pricing dates.

Disclosure and Dissemination of Information

Morgan Stanley will deliver a prospectus in connection with the initial purchase of the PLUS. The procedure for the delivery of a prospectus will be the same as Morgan Stanley's current procedure involving primary offerings.

In addition, Nasdaq will issue a circular to NASD members explaining the unique characteristics and risks of the PLUS. The circular will also note NASD member and member organization responsibilities under Marketplace Rule 2310 and IM-2310-2.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with Section 15A of the Act,⁷ in general, and furthers the objectives of Section 15A(b)(8)⁸ of the Act, in particular, in that the proposed rule change is designed 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, in general, to protect investors and the public interest.

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.

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 on the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR-NASD-2001-73 and should be submitted by November 5, 2001.

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association, and, in particular, the requirements of Section 15A of the Act.⁹ Specifically, the Commission finds that the proposal is consistent with Section 15A(b)(6) of the Act, which requires that the rules be designed to

⁶ NASD Marketplace Rule 2310(b) requires members to make reasonable efforts to obtain information concerning a customer's financial status, a customer's tax status, the customer's investment objectives, and such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer.

⁷ 15 U.S.C. 78o-3.

⁸ 15 U.S.C. 78o-3(b)(6).

⁹ 15 U.S.C. 78o-3.

promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in processing information with respect to and facilitating transactions in securities, as well as to remove impediments to and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest.¹⁰ The Commission believes that the proposal to list and trade the PLUS will provide investors flexibility in satisfying their investment needs by providing them with the opportunity to obtain leveraged returns based on the Nasdaq-100 Index.

The Commission notes that the PLUS are leveraged debt instruments and that their price will be derived and based upon the performance and value of the Nasdaq-100 Index. Accordingly, the level of risk involved in the purchase or sale of the PLUS is similar to the risk involved in the purchase or sale of traditional common stock. In addition, because the final rate of return of the PLUS is derivatively priced and is based on the performance of an index of securities, there are several issues regarding the trading of this type of product.

The Commission notes that Nasdaq's rules and procedures that address the special concerns attendant to the trading of hybrid securities will be applicable to the PLUS. In particular, by imposing the hybrid listing standards, suitability, disclosure, and compliance requirements noted above, the Commission believes Nasdaq has addressed adequately the potential problems that could arise from the hybrid nature of the PLUS. Moreover, Nasdaq will distribute a circular to its membership calling attention to the specific risks associated with the PLUS.

In approving the product, the Commission recognizes that the components of the Nasdaq-100 Index may change each year over the life of the product. Nevertheless, the Commission believes that this is acceptable because Nasdaq has clearly stated its guidelines and formula for replacing components from a specific group of the largest and most actively traded securities listed on the Nasdaq, including companies across a variety of major industry groups. Each year, as noted above, the index of securities comprising the Nasdaq-100 Index will represent the 100 largest non-financial companies listed on The Nasdaq National Market tier of Nasdaq. Nasdaq will do the calculation for replacements based on a set formula to determine which of the securities will be in the

Nasdaq-100 Index for the following year. The Commission believes that within these confines the potential changes in the components of the Nasdaq-100 Index are reasonable and will meet the expectation of investors.

In addition, the Commission notes that, unlike traditional debt securities, the PLUS are non-principal protected. The PLUS will not have a minimum principal amount that will be repaid and may be less than the original issue price of the PLUS. The interest payments on the PLUS prior to or at maturity approximates the current dividend yield on the Nasdaq-100 Index and will not be adjusted up or down over the life of the PLUS. The Commission also notes that the PLUS will be registered under Section 12 of the Act and will be treated as equity securities, subject to NASD and Nasdaq's existing equity trading rules, including rules or suitability, margin, disclosure, trading hours, and surveillance.

Nasdaq represents that the PLUS meet NASD requirements for depository eligibility under NASD Market Place Rules 4310 and 11310 for purposes of clearance and settlement. The Commission notes that Morgan Stanley will deliver a prospectus to investors with the initial purchase of the PLUS. In addition, Nasdaq will issue a circular to NASD members explaining the unique characteristics and risks of the PLUS. The circular will also note NASD member and member organization responsibilities under Marketplace rule 2310 and IM-2310-2. Specifically, NASD members must have reasonable grounds for believing that a recommendation to a customer regarding the purchase, sale or exchange of any security is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.

The Commission recognizes that as of October 2003, Morgan Stanley has the option to call all of the PLUS. Furthermore, the Commission notes that the PLUS are dependent upon the individual credit of the issuer, Morgan Stanley. To some extent this credit risk is minimized by Nasdaq's listing standards in NASD Marketplace Rule 4420(f), which provide the only issuers satisfying substantial asset and equity requirements may issue securities such as the PLUS. In addition, Nasdaq's hybrid listing standards further require that the PLUS have at least \$4 million in market value.¹¹ In any event, financial information regarding Morgan Stanley,

in addition to the information on the issuers of the underlying securities comprising the Nasdaq-100 Index, will be publicly available.¹²

The Commission also has a systemic concern, however, that a broker-dealer, such as Morgan Stanley, or a subsidiary providing a hedge for the issuer will incur position exposure. As discussed in the prior approval orders for other hybrid instruments (*e.g.*, the MITTS), the Commission believes this concern is minimal given the size of the PLUS issuance in relation to the net worth of Morgan Stanley.

The Commission also believes that the listing and trading of the PLUS should not unduly impact the market for the underlying securities comprising the Nasdaq-100 Index. First, the underlying securities comprising the Nasdaq-100 Index are well-capitalized, highly liquid stocks listed on the Nasdaq-100 Index, no single stock or group of stocks will likely dominate the Nasdaq-100 Index. Nasdaq will rebalance and adjust the weight of the Nasdaq-100 Index on a quarterly basis, or sooner in the event of corporate actions such as mergers or stock repurchases. Additionally, Nasdaq's surveillance procedures will serve to deter as well as detect any potential manipulation.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. Nasdaq has requested accelerated approval in order to begin listing and trading the PLUS immediately. In determining to grant the accelerated approval for good cause, the Commission notes that the Nasdaq-100 Index is an index of large, actively traded securities listed on the Nasdaq. Additionally, the PLUS will be listed pursuant to existing hybrid security listing standards as described above. Moreover, the Nasdaq-100 Index's weighting methodology is a commonly applied index calculation method. Based on the above, the Commission finds, consistent with Sections 15A(b)(6)¹³ and 19(b)¹⁴ of the Act, that there is good cause for accelerate approval of the product.

The Commission is approving Nasdaq's proposed listing and trading standards for the PLUS. The Commission specifically notes that, notwithstanding approval of the listing standards for the PLUS, other similarly structured products will require review

¹⁰ 15 U.S.C. 78o-3(b)(6).

¹¹ See NASD Marketplace Rule 4420(f).

¹² The companies that comprise the Nasdaq-100 Index are reporting companies under the Act.

¹³ 15 U.S.C. 78o-3(b)(6).

¹⁴ 15 U.S.C. 78s(b).

by the Commission prior to being trading on Nasdaq.

V. Conclusion

It is Therefore Ordered, pursuant to Section 19(b)(2) of the Act,¹⁵ that the proposed rule change (SR-NASD-2001-73) is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁶

Margaret H. McFarland,

Deputy Secretary.

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BILLING CODE 8010-01-M

SMALL BUSINESS ADMINISTRATION

Declaration of Military Reservist Economic Injury Disaster Loan #R202

As a result of Public Law 106-50, the Veterans Entrepreneurship and Small Business Development Act of 1999, this notice establishes the application filing period for the Military Reservist Economic Injury Disaster Loan program. Effective October 1, 2001, small businesses employing military reservists may apply for economic injury disaster loans if those employees are called up to active duty during a period of military conflict existing on or after March 24, 1999 and those employees are essential to the success of the small business daily operations. The filing period for small businesses to apply for economic injury loan assistance under the Military Reservist Economic Injury Disaster Loan Program begins on the date the essential employee is ordered to active duty and ends on the date 90 days after the essential employee is discharged or released from active duty. However, if a military reservist, who is an essential employee, was ordered to active duty on or after March 24, 1999, because of a military conflict, and was released or discharged prior to the date of the publication of this notice in the **Federal Register**, the affected small business has 90 days from such date of publication to make such application.

The purpose of the Military Reservist economic injury disaster loan program (MREIDL) is to provide funds to eligible small businesses to meet its ordinary and necessary operating expenses that it could have met, but is unable to meet, because an essential employee was called-up to active duty in their role as a military reservist. These loans are intended only to provide the amount of working capital needed by a small

business to pay its necessary obligations as they mature until operations return to normal after the essential employee is released from active military duty.

Applications for loans for military reservist economic injury loans may be obtained and filed at the address listed below: U.S. Small Business Administration, Disaster Area 2 Office, One Baltimore Place, Suite 300, Atlanta, GA 30308, 1-800-359-2227.

The interest rate for eligible small businesses is 4 percent. The number assigned for economic injury is R20200.

(Catalog of Federal Domestic Assistance Program No. 59002)

Dated: October 5, 2001.

James E. Rivera,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 01-25847 Filed 10-12-01; 8:45 am]

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SMALL BUSINESS ADMINISTRATION

Declaration of Military Reservist Economic Injury Disaster Loan #R302

As a result of Public Law 106-50, the Veterans Entrepreneurship and Small Business Development Act of 1999, this notice establishes the application filing period for the Military Reservist Economic Injury Disaster Loan program. Effective October 1, 2001, small businesses employing military reservists may apply for economic injury disaster loans if those employees are called up to active duty during a period of military conflict existing on or after March 24, 1999 and those employees are essential to the success of the small business daily operations. The filing period for small businesses to apply for economic injury loan assistance under the Military Reservist Economic Injury Disaster Loan Program begins on the date the essential employee is ordered to active duty and ends on the date 90 days after the essential employee is discharged or released from active duty. However, if a military reservist, who is an essential employee, was ordered to active duty on or after March 24, 1999, because of a military conflict, and was released or discharged prior to the date of the publication of this notice in the **Federal Register**, the affected small business has 90 days from such date of publication to make such application.

The purpose of the Military Reservist economic injury disaster loan program (MREIDL) is to provide funds to eligible small businesses to meet its ordinary and necessary operating expenses that it could have met, but is unable to meet, because an essential employee was

called-up to active duty in their role as a military reservist. These loans are intended only to provide the amount of working capital needed by a small business to pay its necessary obligations as they mature until operations return to normal after the essential employee is released from active military duty.

Applications for loans for military reservist economic injury loans may be obtained and filed at the address listed below: U.S. Small Business Administration, Disaster Area 3 Office,

4400 Amon Carter Blvd., Suite 102, Ft. Worth, TX 75155. 1-800-366-6303.

The interest rate for eligible small businesses is 4 percent. The number assigned for economic injury is R30200.

(Catalog of Federal Domestic Assistance Program No. 59002).

Dated: October 5, 2001.

James E. Rivera,

Acting Associate Administrator for Disaster Assistance.

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SMALL BUSINESS ADMINISTRATION

Declaration of Military Reservist Economic Injury Disaster Loan #R402

As a result of Public Law 106-50, the Veterans Entrepreneurship and Small Business Development Act of 1999, this notice establishes the application filing period for the Military Reservist Economic Injury Disaster Loan program. Effective October 1, 2001, small businesses employing military reservists may apply for economic injury disaster loans if those employees are called up to active duty during a period of military conflict existing on or after March 24, 1999 and those employees are essential to the success of the small business daily operations. The filing period for small businesses to apply for economic injury loan assistance under the Military Reservist Economic Injury Disaster Loan Program begins on the date the essential employee is ordered to active duty and ends on the date 90 days after the essential employee is discharged or released from active duty. However, if a military reservist, who is an essential employee, was ordered to active duty on or after March 24, 1999, because of a military conflict, and was released or discharged prior to the date of the publication of this notice in the **Federal Register**, the affected small business has 90 days from such date of publication to make such application.

The purpose of the Military Reservist economic injury disaster loan program (MREIDL) is to provide funds to eligible small businesses to meet its ordinary

¹⁵ 15 U.S.C. 78s(b)(2).

¹⁶ 17 CFR 200.30-2(a)(12).