

then present that net amount as its "available net resources" for participation with the other clearing agencies. FICC believes that it already has the authority in its rules to do so because the rules provide that it may enter into cross-guaranty agreements and thus follow their provisions.⁴ However, FICC believes that it is prudent to make this explicit in its rules for the avoidance of any doubt. The proposed offset is consistent with the rationale for combining GSCC and MBSCC into FICC because it further optimizes the consolidation of risk management processes.

FICC believes the proposed rule change is consistent with the requirements of Section 17A of the Act and the rules and regulations thereunder because it clarifies FICC's rules and further optimizes the synergies created by the combination of GSCC and MBSCC into FICC.

(B) Self-Regulatory Organization's Statement on Burden on Competition

FICC does not believe that the proposed rule change would have an impact on or impose a burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments relating to the proposed rule change have not yet been solicited nor received. FICC will notify the Commission of any written comments received by FICC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(i) of the Act⁵ and rule 19b-4(f)(1)⁶ thereunder because it constitutes a stated policy, practice, or interpretation with respect to the meaning, enforcement, or administration of an existing rule. At any time within sixty days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the

Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. 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. Comments may also be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-FICC-2003-02. This file number should be included on the subject line if e-mail is used. To help us process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. 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 Section, 450 Fifth Street NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of FICC. All submissions should refer to the File No. SR-FICC-2003-02 and should be submitted by May 19, 2003.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.⁷

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 03-10381 Filed 4-25-03; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47706; File No. SR-NASD-2003-33]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change and Amendment No. 1 by the National Association of Securities Dealers, Inc. Relating to Trading of Certain Holding Company Depository Receipts

April 21, 2003.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on March 7, 2003, 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 and II below, which Items have been prepared by Nasdaq. On April 17, 2003, Nasdaq 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 to approve the amended proposed rule change on an accelerated basis.

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

Nasdaq proposes to adopt standards for the trading of certain Trust Issued Receipts known as Holding Company Depository Receipts ("HOLDRs") on an over-the-counter basis.

II. Self-Regulatory Organization's Statement 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from John D. Nachmann, Senior Attorney, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated April 16, 2003 ("Amendment No. 1"). Amendment No. 1: (1) Makes clarifications and technical corrections to the proposed rule text and the purpose section of the filing; (2) discusses in the purpose section of the proposal Nasdaq's short sale exemption of certain HOLDRs, pursuant to NASD Rule 3350; (3) clarifies, by updating Exhibit 1, which HOLDRs specifically do not satisfy Nasdaq's generic listing and trading requirements pursuant to Rule 19b-4(e); and (4) provides additional detail on the component securities for each HOLDR, including share price, trading volume, and public float data in new Exhibit 3.

⁴ The parties have amended the multilateral cross-guaranty agreement to reflect the merger of GSCC and MBSCC and the resulting FICC, as well as to reflect the offset between the Divisions of FICC, that is the subject of this rule filing. The offset between the Divisions of FICC is similar to the offset between DTC and its Mortgage-Backed Securities Division (which no longer exists) that was contained in the version of the multilateral cross-guaranty agreement and was included in the rule filings the Commission approved.

⁵ 15 U.S.C. 78s(b)(3)(A)(i).

⁶ 17 CFR 240.19b-4(f)(1).

⁷ 17 CFR 200.30-3(a)(12).

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

Nasdaq proposes to trade, on an over-the-counter basis, the following HOLDRs: (1) Broadband; (2) B2B Internet; (3) Europe 2001; (4) Internet; (5) Internet Architecture; (6) Internet Infrastructure; (7) Market 2000+; (8) Software; (9) Utilities; and (10) Wireless (each a "HOLDR" and collectively, the "HOLDRs").⁴ The HOLDRs currently are listed and traded on the American Stock Exchange LLC ("Amex") and trade on other national securities exchanges. The following paragraphs contain information applicable to all the HOLDRs generally.⁵

Trust Issued Receipts Generally

HOLDRs, a type of Trust Issued Receipt, are negotiable receipts that are issued by a trust representing securities of issuers that have been deposited and are held on behalf of the holders of the Trust Issued Receipts. Trust Issued Receipts are designed to allow investors to hold securities from a variety of companies throughout a particular industry in a single, Nasdaq-or-exchange-listed⁶ and traded instrument that represents their beneficial ownership in the underlying securities. Holders of Trust Issued Receipts maintain beneficial ownership of each of the underlying securities evidenced by Trust Issued Receipts. Holders may cancel their Trust Issued Receipts at any time to receive the underlying securities.

Beneficial owners of the receipts will have the same rights, privileges and obligations as they would have if they beneficially owned the underlying securities outside of the Trust Issued Receipt program. Holders of the receipts have the right to instruct the trustee to vote the underlying securities evidenced

by the receipts, will receive reports, proxies and other information distributed by the issuers of the underlying securities to their security holders, and will receive dividends and other distributions declared and paid by the issuers of the underlying securities to the trustee.

Trust Issued Receipts are not leveraged instruments, and therefore do not possess any of the attributes of stock index options. Nasdaq believes that the level of risk involved in the purchase and sale of Trust Issued Receipts is almost identical to the risk involved in the purchase or sale of the common stocks represented by the receipt.

Trust Issued Receipts will be issued by a trust created pursuant to a depositary trust agreement. After the initial offering, the trust may issue additional receipts on a continuous basis when an investor deposits the requisite securities with the trust. An investor in Trust Issued Receipts will be permitted to withdraw his or her underlying securities upon delivery to the trustee of one or more round-lots of 100 Trust Issued Receipts and to deposit such securities to receive Trust Issued Receipts.

Nasdaq Rules Applicable to the Trading of HOLDRs

Trust Issued Receipts, including HOLDRs, will be eligible to be traded through the Intermarket Trading System and will therefore be subject to the trade-through provisions of NASD Rule 5262. HOLDRs, as Trust Issued Receipts, are considered "securities," and thus dealings in HOLDRs will be conducted pursuant to Nasdaq and the NASD's existing equity trading rules. Thus, Nasdaq's general dealing and settlement rules will apply, including its rules on clearance and settlement of securities transactions and its equity margin rules. Other generally applicable Nasdaq equity rules and procedures will also apply.⁷ In addition, regular equity trading hours of 9:30 a.m. and 4 p.m. will apply to transactions in HOLDRs. However, trading rules pertaining to the availability of odd-lot trading in Nasdaq equities will not apply to the trading of HOLDRs, since HOLDRs will only be traded in round-lots. NASD's surveillance procedures for HOLDRs will be similar for those of Portfolio Depositary Receipts and Index Fund Shares and will incorporate and rely upon existing NASD surveillance procedures governing equities.

⁷ E.g., pursuant to NASD Rule 4613(a)(1)(D), a minimum quotation increment of one penny will apply to transactions of Trust Issued Receipts on Nasdaq.

Furthermore, unless otherwise specified, the trading of HOLDRs generally will be exempt from the short sale rule set forth in NASD Rule 3350.⁸

Prior to the commencement of trading in HOLDRs, Nasdaq will issue a circular to members highlighting the characteristics of purchases in HOLDRs, including that HOLDRs are not individually redeemable. In addition, the circular will inform members of Nasdaq policies about trading halts in such securities. Specifically, the circular will note that trading of HOLDRs will be halted whenever Nasdaq trading in equity securities is halted as a result of activation of market-wide "circuit breakers," which are tied to large decreases in the Dow Jones Industrial Average. Nasdaq may also halt trading in HOLDRs upon consideration of, among other factors: (1) The extent to which trading has ceased in the underlying security(s); (2) whether trading has been halted or suspended in the primary market(s) for any combination of underlying securities accounting for 20% or more of the applicable current index group value; and (3) the presence of other unusual conditions or circumstances deemed to be detrimental to the maintenance of a fair and orderly market. The trading in HOLDRs that has been the subject of a trading halt or suspension, may resume when Nasdaq determines that the conditions which led to the halt or suspension are no longer present or that the interests of a fair and orderly market are served by a resumption of trading.

Disclosure to Customers

Nasdaq will require members to provide all purchasers of newly issued Trust Issued Receipts with a prospectus for that series of HOLDRs.

Trading Issues for Trust Issued Receipts (Including HOLDRs)

A round-lot of any of the above Trust Issued Receipts represents a holder's individual and undivided beneficial ownership interest in the whole number of securities represented by the receipt. The amount of underlying securities for each round-lot of 100 Trust Issued Receipts will be determined at the beginning of the marketing period and will be disclosed in the prospectus to investors. Trust Issued Receipts may be

⁸ Nasdaq has provided criteria that Trust Issued Receipts must satisfy to qualify for and maintain the short sale exemption. For further details, see proposed rule change SR-NASD-2003-32. As of April 11, 2003, the trading of all HOLDRs, except for the B2B Internet HOLDRs and the Internet HOLDRs, were exempt from the short sale rule set forth in NASD Rule 3350. Thus, only short sales of B2B Internet HOLDRs and Internet HOLDRs must occur on an "up bid."

⁴ For further details on the component securities for each HOLDR, see Exhibit 3 to the proposed rule change, *supra* note 3.

⁵ Nasdaq notes that this information is based upon descriptions included in the various Trust Issued Receipt prospectuses and depositary trust agreements, the Amex submissions relating to its Trust Issued Receipts listing proposal, and the Commission's order approving the Amex proposal.

⁶ See Amendment No. 1, *supra* note.

acquired, held or transferred only in round-lot amounts (or round-lot multiples) of 100 receipts. In order to ensure that transactions in Trust Issued Receipts are effected only in such amounts, no member may enter through the facilities of Nasdaq, for the account of a customer or for its own account, a quote or order for Trust Issued Receipts other than for a round-lot or round-lot multiple.

Nasdaq believes that HOLDERS will not trade at a material discount or premium to the assets held by the issuing trust, because the arbitrage process should promote correlative pricing between the HOLDERS and the underlying securities. If the price of a HOLDER deviates enough from the portfolio of underlying securities to create a material discount or premium, an arbitrage opportunity is created allowing the arbitrageur to either buy the HOLDER at a discount, immediately cancel them in exchange for the underlying securities and sell the shares in the cash market at a profit, or sell the HOLDER short at a premium and buy the securities represented by the receipts to deposit in exchange for the HOLDER to deliver against the short position. In both instances, the arbitrageur locks in a profit and the markets move back into line.

Maintenance of the HOLDERS Portfolio

Except when a reconstitution event occurs, as described below, the securities represented by a HOLDER will not change. According to the prospectus of Trust Issued Receipts, under no circumstances will a new company be added to the group of issuers of the underlying securities, and weightings of component securities will not be adjusted after they are initially set.⁹

Reconstitution Events of HOLDERS

Trust agreements will provide for, and prospectuses for HOLDERS will describe, the automatic distribution of specified underlying securities in the trust's portfolio to the beneficial owners of HOLDERS in the circumstances referred to in such trust agreements and prospectuses as "reconstitution events." The reconstitution events occur under the following circumstances:

(1) If the underlying securities of a company evidenced by a HOLDER no longer has a class of common stock registered under section 12 of the Act,

then those securities will no longer be considered underlying securities and the trustee will distribute the securities of that company to the owners of HOLDERS;

(2) If the Commission finds that a company with underlying securities evidenced by the HOLDERS is a company that should be registered as an investment company under the Investment Company Act of 1940, and the trustee has actual knowledge of the Commission's finding, then the trustee will distribute the securities of that company to the owners of the HOLDERS;

(3) If the underlying securities of a company evidenced by a HOLDER are no longer outstanding as a result of a merger, consolidation or other corporate combination the trustee will distribute the consideration paid by and received from the acquiring company to the beneficial owners of HOLDERS, unless the consideration is additional underlying securities (*i.e.*, the acquiring company's securities are already included in the HOLDER as underlying securities), in which case such additional securities will be deposited into the trust; and

(4) If an underlying issuer's underlying securities are delisted from trading on a primary national securities exchange or Nasdaq market and are not listed for trading on another national securities exchange or Nasdaq within five business days from the date the underlying securities are delisted.

If the trustee removes a underlying security from the trust due to the occurrence of one of the reconstitution events described above, the trustee, in accordance with the depositary trust agreement, will deliver the underlying security to the investor as promptly as practicable after the date that the trustee has knowledge of the occurrence of a reconstitution event.

Issuance and Cancellation of HOLDERS

The trust will issue and cancel, and an investor may obtain, hold, trade or surrender, HOLDERS only in a round-lot of 100 or in round-lot multiples. While investors will be able to acquire, hold, transfer and surrender a round-lot of 100 HOLDERS, the bid and asked prices will be quoted on a per receipt basis. The trust will issue additional receipts on a continuous basis when an investor deposits the required securities with the trust.

An investor may obtain HOLDERS by either purchasing them on a national securities exchange or Nasdaq, or by delivering to the trust during its normal business hours the requisite securities evidencing a round-lot of HOLDERS. The trustee will charge an issuance fee of up

to \$10.00 per 100 HOLDERS. If a holder wants to cancel HOLDERS and withdraw the underlying securities, the holder may do so by surrendering the receipts to the trust during normal business hours. The trustee will charge a cancellation fee of up to \$10.00 per 100 HOLDERS. Lower charges may be assigned for bulk issuances and cancellations. The holder will receive the underlying securities no later than the business day after the trustee receives the request.

Termination of HOLDERS

The trust shall terminate upon the earlier of: (i) The removal of the HOLDERS from listing on a national securities exchange or Nasdaq if they are not listed for trading on another national securities exchange or Nasdaq within five business days from the date the receipts are delisted; (ii) the trustee resigns and no successor trustee is appointed within sixty days from the date the trustee provides notice to the initial depositor of its intent to resign; (iii) 75 percent of beneficial owners of outstanding HOLDERS (other than Merrill Lynch, Pierce, Fenner & Smith Incorporated) vote to dissolve and liquidate the trust; or (iv) December 31, 2039. If a termination event occurs, the trustee will distribute the underlying securities to the beneficial owners as promptly as practicable after the termination event.

Criteria for Initial and Continued Listing

Except as otherwise noted in Exhibit 1, Nasdaq believes that the HOLDERS satisfy Nasdaq's continued listing and trading criteria as set forth in NASD Rule 4420(l), which is generally consistent with the continued listing and trading criteria currently used by the Amex, the New York Stock Exchange ("NYSE"),¹⁰ and the regional exchanges.

Because of the continuous issuance and cancellation of Trust Issued Receipts, Nasdaq believes that it is necessary to maintain appropriate flexibility in connection with listing and trading a specific trust. If Trust Issued Receipts are to be listed on Nasdaq under Rule 4420(l), Nasdaq will establish a minimum number of receipts that must be outstanding at commencement of Nasdaq trading, and such minimum number will be included

⁹ Nasdaq represents that the number of each security represented in a receipt may change due to certain corporate events such as stock splits or reverse stock splits on underlying securities, and the relative weightings among the underlying securities may change based on the current market price of the underlying securities. See NASD Rule 4420(l)(4).

¹⁰ See Securities Exchange Act Release No. 41892 (September 21, 1999), 64 FR 52559 (September 29, 1999) (approving listing and trading of Trust Issued Receipts and Internet HOLDERS on the Amex); Securities Exchange Act Release No. 45718 (April 9, 2002), 67 FR 18965 (April 17, 2002) (approving the listing and trading of Trust Issued Receipts on the NYSE).

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).

including whether the proposed rule change, as amended, 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-2003-33 and should be submitted by May 19, 2003.

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

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 15A(b)(6) of the Act,¹⁵ and the rules and regulations thereunder applicable to a national securities association.¹⁶ Specifically, the Commission finds that this proposal, which establishes standards for trading the HOLDRs over-the-counter, will provide investors with a convenient and less expensive way of participating in the securities markets. Nasdaq's proposal should advance the public interest by providing investors with increased flexibility in satisfying their investment needs by allowing them to purchase and sell a single security replicating the performance of a broad portfolio of stocks at negotiated prices throughout the business day. Accordingly, the Commission finds that Nasdaq's proposal will facilitate transactions in securities, remove impediments to and perfect the mechanism of a free and open market

and a national market system, and, in general, protect investors and the public interest, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.¹⁷

As noted in the Amex approval order, the Commission believes that HOLDRs will provide investors with an alternative to trading a broad range of securities on an individual basis, and will give investors the ability to trade the HOLDRs representing a portfolio of securities continuously throughout the business day in secondary market transactions at negotiated prices. The HOLDRs will allow investors to: (1) Respond quickly to changes in the overall securities markets generally and for the industry represented by a particular trust; (2) trade, at a price disseminated on a continuous basis, a single security representing a portfolio of securities that the investor owns beneficially; (3) engage in hedging strategies similar to those used by institutional investors; (4) reduce transaction costs for trading a portfolio of securities; and (5) retain beneficial ownership of the securities underlying the HOLDRs.

Although the HOLDRs are not leveraged instruments, and therefore do not possess any of the attributes of stock index options, their prices will be derived and based upon the securities held in their respective trusts. Accordingly, the level of risk involved in the purchase or sale of Trust Issued Receipts is similar to the risk involved in the purchase or sale of traditional common stock, with the exception that the pricing mechanism for Trust Issued Receipts is based on a basket of securities.¹⁸

Trading of the HOLDRs Over-the-Counter

The Commission finds that Nasdaq's proposal contains adequate rules and procedures to govern the trading of the HOLDRs over-the-counter. HOLDRs are equity securities that will be subject to the full panoply of NASD and Nasdaq rules governing the trading of equity securities on Nasdaq, including, among others, rules governing the priority, parity and precedence of orders,

responsibilities of the specialist, account opening and customer suitability requirements, and the election of a stop or limit order.¹⁹

In addition, Nasdaq has developed specific listing and delisting criteria for the HOLDRs that will help to ensure that a minimum level of liquidity will exist for the HOLDRs to allow for the maintenance of fair and orderly markets. The delisting criteria also allow Nasdaq to consider the suspension of trading and the delisting of a HOLDR if an event occurred that made further dealings in such securities inadvisable. This will give Nasdaq flexibility to delist the HOLDRs if circumstances warrant such action. Nasdaq's proposal also provides procedures to halt trading in the HOLDRs in certain enumerated circumstances.

Moreover, in approving this proposal, the Commission notes Nasdaq's belief that the HOLDRs will not trade at a material discount or premium in relation to the overall value of the trusts' assets because of potential arbitrage opportunities. Nasdaq also represents that the potential for arbitrage should keep the market price of a HOLDR comparable to the overall value of the underlying securities.

Furthermore, the Commission believes that Nasdaq's proposal to trade the HOLDRs should enhance market liquidity, and should promote more accurate pricing, tighter quotations, and reduced price fluctuations. The Commission also believes that such trading should allow customers to receive the best possible execution of their transactions in the HOLDRs.

Finally, Nasdaq will apply NASD surveillance procedures for the HOLDRs that will be similar to the procedures used for investment company units and will incorporate and rely upon existing NASD surveillance procedures governing equities. The Commission believes that these surveillance procedures are adequate to address concerns associated with the trading of the HOLDRs over-the-counter, including any concerns associated with purchasing and redeeming round-lots of 100 receipts. Accordingly, the Commission believes that the rules governing the trading of the HOLDRs provide adequate safeguards to prevent manipulative acts and practices and to protect investors and the public interest.

¹⁵ 15 U.S.C. 78o-3(6).

¹⁶ The Commission findings in this approval order are prospective only from the date of this order. Prior to Nasdaq's trading of Trust Issued Receipts, the Commission staff notified Nasdaq staff that these listing and trading rules and short sale rule change contained herein were necessary. The Commission is concerned that Nasdaq failed to seek Commission approval of such proposed rules and rule changes until well after Nasdaq began trading Trust Issued Receipts, despite prior notification by Commission staff to do so. The Commission expects Nasdaq to surveil the trading of these products for compliance with applicable rules, including NASD Rule 3350.

¹⁷ In approving this rule, the Commission notes that it has also considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁸ The Commission has concerns about continued trading of Trust Issued Receipts whether listed or over-the-counter, if the number of component securities fails to reflect a cross section of the selected industry. Accordingly, Nasdaq has represented that it would consult the Commission concerning continued trading, once the trust has fewer than nine component securities, and for each subsequent loss of a security thereafter.

¹⁹ Trading rules pertaining to the availability of odd-lot trading do not apply because the Holders only can be traded in round-lots or round-lot multiples.

Disclosure and Dissemination of Information

The Commission believes that Nasdaq's proposal will ensure that investors have information that will allow them to be adequately apprised of the terms, characteristics, and risks of trading the HOLDRs. The prospectus will address the special characteristics of a particular HOLDR basket, including a statement regarding its redeemability and method of creation. The Commission notes that all investors in the HOLDRs who purchase in the initial offering will receive a prospectus. In addition, anyone purchasing a HOLDR directly from the trust (by delivering the underlying securities to the trust) will also receive a prospectus. Finally, all Nasdaq member firms that purchase the HOLDRs from the trust for resale to customers must deliver a prospectus to such customers.

The Commission also notes that prior to the commencement of trading the HOLDRs, Nasdaq will issue a circular to its members explaining the unique characteristics and risks of this type of security. The circular also will note members' prospectus delivery requirements, and highlight the characteristics of purchases in HOLDRs, including that the HOLDRs are not individually redeemable. The circular also will inform members of Nasdaq policies regarding trading halts in HOLDRs.

As described above, the Commission has previously approved similar Amex and NYSE rules that permit the listing and trading of individual Trust Issued Receipts, including the trading of Trust Issued Receipts over-the-counter. In approving these securities for trading, the Commission considered their structure, their usefulness to investors and the markets, and Nasdaq's rules and surveillance programs that govern their trading.

The Commission notes that the HOLDRs that Nasdaq proposes to trade over-the-counter currently trade on other national securities exchanges. The Commission therefore believes that it is appropriate to approve these HOLDRs for trading over-the-counter on Nasdaq, as their trading should produce the same benefits to Nasdaq and to investors.

Nasdaq has requested that the Commission find good cause for approving the proposed rule change, as amended, prior to the thirtieth day after the date of publication of notice in the **Federal Register**. The Commission believes that Nasdaq's proposal to trade the HOLDRs over-the-counter will provide investors with a convenient and

less expensive way of participating in the securities markets. The Commission believes that the proposed rule change, as amended, could produce added benefits to investors through the increased competition between other market centers trading the product.

Specifically, the Commission believes that by increasing the availability of the HOLDRs as an investment tool, Nasdaq's proposal should help provide investors with increased flexibility in satisfying their investment needs, by allowing them to purchase and sell a single security replicating the performance of a broad portfolio of stocks at negotiated prices throughout the business day.

As noted above, the Commission has approved the listing and trading of HOLDRs at other exchanges, under rules that are substantially similar to Nasdaq's rules.²⁰ The Commission published those rules in the **Federal Register** for the full notice and comment period. No comments were received on the proposed rules, and the Commission found them consistent with the Act.²¹ The HOLDRs at issue are currently trading on other securities exchanges pursuant to UTP. The Commission does not believe that trading of this product raises novel regulatory issues that were not addressed in the previous filings. Accordingly, the Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice in the **Federal Register**.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,²² that the proposed rule change (SR-NASD-2003-33), as amended, is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²³

Jill M. Peterson,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47705; File No. SR-NASD-2003-32]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change and Amendment No. 1 by the National Association of Securities Dealers, Inc. Relating to Listing and Trading Standards for Trust Issued Receipts

April 21, 2003.

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 7, 2003, 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 and II below, which Items have been prepared by Nasdaq. On April 17, 2003, Nasdaq 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 to approve the amended proposed rule change on an accelerated basis.

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

Nasdaq proposes to establish listing standards under NASD Rule 4420(l) for the listing and trading, or trading over-the-counter, of Trust Issued Receipts. Nasdaq also proposes to adopt generic listing standards that permit the listing and trading, or trading over-the-counter, of Trust Issued Receipts pursuant to Rule 19b-4(e) of the Act.⁴ The text of

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from John D. Nachmann, Senior Attorney, Nasdaq, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated April 16, 2003 ("Amendment No. 1"). Amendment No. 1: (1) Makes clarifications and technical corrections to the proposed rule text and the purpose section of the filing; (2) clarifies that a Trust Issued Receipt is a Nasdaq- or exchange-listed and traded instrument; and (3) clarifies that the Commission may review and determine, pursuant to Section 19(b)(2) of the Act, whether continuation of Nasdaq's short sale exemption under Rule 3350 is appropriate.

⁴ 17 CFR 240.19b-4(e). Rule 19b-4(e) provides that the listing and trading of a new derivative securities product by a self-regulatory organization ("SRO") shall not be deemed a proposed rule change, pursuant to Rule 19b-4(c)(1) under the Act, if the Commission has approved, pursuant to section 19(b) of the Act, the SRO's trading rules,

Continued

²⁰ See note 7, *supra*.

²¹ *Id.*

²² 15 U.S.C. 78s(b)(2).

²³ 17 CFR 200.30-3(a)(12).