

purchase and redeem Creation Units from the Fund.

16. Section 17(b) authorizes the Commission to exempt a proposed transaction from section 17(a) if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act. Applicants contend that no useful purpose would be served by prohibiting persons affiliated with a Fund, as described above, from purchasing or redeeming Creation Units from the Fund. Applicants represent that Fund affiliates making in-kind purchases and redemptions would be treated no differently from non-affiliates making the same types of transactions. Applicants state that all purchases and redemptions of Creation Units would be at the Fund's next calculated NAV. Applicants also state that, in all cases, Deposit Securities and Redemption Securities will be valued in the same manner, using the same standards, as those securities are valued for purposes of calculating the Fund's NAV. Applicants assert that, for these reasons, the requested relief meets the standards of sections 6(c) and 17(b).

#### **Applicants' Conditions**

Applicants agree that the order granting the requested relief will be subject to the following conditions:

1. No portfolio of Index Trust other than the Funds will issue a class of VIPER Shares unless applicants have requested and received with respect to such portfolio either exemptive relief from the Commission or a no-action letter from the Division of Investment Management of the Commission.

2. The VIPER Shares Prospectus and the Product Description for each Fund will clearly disclose that, for purposes of the Act, VIPER Shares are issued by the Fund and that the acquisition of VIPER Shares by investment companies is subject to the restrictions of section 12(d)(1) of the Act.

3. As long as a Fund operates in reliance on the requested order, the VIPER Shares will be listed on an Exchange.

4. The VIPER Shares of a Fund will not be advertised or marketed as shares of an open-end investment company or mutual fund. The VIPER Shares Prospectus of each Fund will prominently disclose that VIPER Shares are not individually redeemable and will disclose that holders of VIPER Shares may acquire those shares from

the Fund and tender those shares for redemption to the Fund in Creation Unit aggregations only. Any advertised material that describes the purchase or sale of Creation Units or refers to redeemability will prominently disclose that VIPER Shares are not individually redeemable and that holders of VIPER Shares may acquire those shares from the Fund and tender those shares for redemption to the Fund in Creation Unit aggregations only.

5. Before a Fund may rely on the order, the Commission will have approved, pursuant to rule 19b-4 under the Securities Exchange Act of 1934, an Exchange rule requiring Exchange members and member organizations effecting transactions in VIPER Shares to deliver a Product Description to purchasers of VIPER Shares.

6. On an annual basis, the Board, including a majority of trustees who are not interested persons of Index Trust, must determine, for each Fund, that the allocation of distribution expenses among the classes of Conventional Shares and VIPER Shares in accordance with the Multi-Class Distribution Formula is in the best interests of each class and of the Fund as a whole. Index Trust will preserve for a period of not less than six years from the date of a Board determination, the first two years in an easily accessible place, a record of the determination and the basis and information upon which the determination was made. This record will be subject to examination by the Commission and its staff.

7. For six years following the issuance of a Fund's VIPER Shares, the Fund will (i) record and preserve any investor complaints or reports of confusion concerning the Exchange Option that are communicated to the Fund, VGI, and/or VMC; and (ii) record data tracking the number of investors that, after VIPER Shares are offered, purchase the Fund's Conventional Shares and, within 90 days, exchange those shares for VIPER Shares. The Fund will preserve this information in an easily accessible place, and the information will be subject to examination by the Commission and its staff.

8. Applicant's website, which is and will be publicly accessible at no charge, will contain the following information, on a per VIPER Share Basis, for each Fund: (i) The prior business day's NAV and the closing market price, and a calculation of the premium or discount of the closing market price in relation to the NAV; and (ii) data for a period covering at least the four previous calendar quarters (or the life of a Fund, if shorter) indicating how frequently each Fund's VIPER Shares traded at a

premium or discount to NAV based on daily closing market price, and the magnitude of such premiums and discounts. In addition, the Product Description for each Fund will state that applicants' website has information about the premiums and discounts at which the Fund's VIPER Shares have traded.

9. The VIPER Shares Prospectus and annual report will include, for each Fund: (i) the information listed in condition 8(ii), (a) in the case of the VIPER Shares Prospectus, for the most recently completed calendar year (and the most recently completed quarter or quarters, as applicable), and (b) in the case of the annual report, for no less than the immediately preceding five fiscal years (or the life of the Fund, if shorter); and (ii) the cumulative total return and the average annual total return for one, five, and ten year periods (or the life of the Fund, if shorter) of (a) a VIPER Share based on NAV and market price, and (b) the Fund's Index.

By the Commission.

**Jonathan G. Katz,**

*Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

### **Sunshine Act Meeting**

#### **Agency Meeting**

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94-409, that the Securities and Exchange Commission will hold the following meeting during the week of October 16, 2000.

A closed meeting will be held on Tuesday, October 17, 2000 at 10:30 a.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(4), (8), (9)(A) and (10) and 17 CFR 200.402(a)(4), (8), (9)(A) and (10), permit consideration for the scheduled matters at the closed meeting.

The subject matters of the closed meeting scheduled Tuesday, October 17, 2000 will be:

Institution and settlement of injunctive actions; and

Institution and settlement of administrative proceedings of an enforcement nature

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 942-7070.

Dated: October 10, 2000.

**Jonathan G. Katz,**  
Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-43420; File No. SR-NASD-00-50]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to the Definition of "Public Offering" for Purposes of Nasdaq's Shareholder Approval Rules

October 6, 2000.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on August 11, 2000, The National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its wholly owned 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, II, and III below, which Items have been prepared by the NASD.<sup>2</sup> On October 4, 2000, the Nasdaq filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

Nasdaq is filing with the Commission a proposed rule change regarding the

adoption of interpretive material defining "Public Offering" for purposes of Nasdaq's shareholder approval rules. Below is the text of the proposed rule change. All text is being added.

\* \* \* \* \*

#### IM-4310-2. Definition of a Public Offering

Marketplace Rules 4310(c)(25)(G)(i)(d), 4320(e)(21)(G)(i)(d), and 4460(i)(1)(D) provide that shareholder approval is required for the issuance of common stock (or securities convertible into or exercisable for common stock) equal to 20 percent or more of the common stock or 20 percent or more of the voting power outstanding before the issuance for less than the greater of book or market value of the stock. Under these rules, however, shareholder approval is not required for a "public offering."

Issuers are encouraged to consult with Nasdaq staff in order to determine if a particular offering is a "public offering" for purposes of the shareholder approval rules. Generally, a firm commitment underwritten securities offering registered with the Commission will be considered a public offering for these purposes. Likewise, any other securities offering which is registered with the Commission and which is publicly disclosed and distributed in the same general manner and extent as a firm commitment underwritten securities offering will be considered a public offering for purposes of the shareholder approval rules. However, Nasdaq staff will not treat an offering as a "public offering" for purposes of the shareholder approval rules merely because they are registered with the Commission prior to the closing of the transaction.

When determining whether an offering is a "public offering" for purposes of these rules, Nasdaq staff will consider all relevant factors, including but not limited to:

(i) the type of offering (including whether the offering is conducted by an underwriter on a firm commitment basis, or an underwriter or placement agent on a best-efforts basis, or whether the offering is self-directed by the issuer);

(ii) the manner in which the offering is marketed (including the number of investors offered securities, how those investors were chosen, and the breadth of the marketing effort);

(iii) the extent of the offering's distribution (including the number and identity of the investors who participate in the offering and whether any prior relationship existed between the issuer and those investors);

(iv) the offering price (including the extent of any discount to the market price of the securities offered); and

(v) the extent to which the issuer controls the offering and its distribution.

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

In its filing with the Commission, the NASD 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 statement may be examined at the places specified in Item IV below. The NASD 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

##### (a) Purpose

Nasdaq rules require shareholder approval for stock issuances of 20 percent or more of an issuer's total shares outstanding, offered at less than the greater of book or market value. The applicable rules further provide, however, that shareholder approval is not required for a "public offering," although that term is not defined in the rules. Recently, a number of issuers have inquired as to whether certain large, below-market offerings were "public offerings" because the transactions, which were initiated pursuant to exceptions to the registration requirements, were registered with the Commission prior to closing the transactions.<sup>4</sup> Historically, for purposes of assessing the applicability of the shareholder approval rules, Nasdaq staff has interpreted "public offering" as a broadly distributed, registered offering based on a firm commitment underwriting. Conversely, staff does not consider a transaction to be a "public offering" for these purposes when the transaction is of limited distribution and/or is not based on a firm commitment underwriting, even if the offering was registered. Because the offerings described had limited distributions and, in some cases, the offerees were pre-determined by the issuer, Nasdaq believed that these transactions were not "public offerings" for purposes of the shareholder approval rules.

In order to ensure that all issuers understand how Nasdaq will determine whether a transaction is a "public offering" for purposes of the shareholder approval rules, Nasdaq has prepared the proposed Interpretative Material. Determinations as to whether a transaction is a "public offering" for purposes of these rules will be made based on the facts and circumstances surrounding each particular transaction.

<sup>4</sup> Nasdaq understands that the Commission believes that this activity is not appropriate under Section 5 of the Securities Act of 1933. See 15 U.S.C. 77e.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> The American Stock Exchange, Inc. has filed a similar proposed rule change SR-Amex-00-46. See Securities Exchange Act Release No. 43419 (Oct. 6, 2000).

<sup>3</sup> Amendment No. 1 changes the section under which the proposed rule change was filed from Section 19(b)(3) to Section 19(b)(2) of the Act and made other technical changes. See Letter from Edward Knight, Executive Vice President and Chief Legal Officer, Nasdaq, to Katherine A. England, Assistant Director, SEC (Oct. 2, 2000).