

fact that Primex allows dealers to internalize customer orders should be viewed as a reason to deny permanent approval of Primex. The Commission believes that Primex may provide an opportunity for customer orders to receive price improvement, even if the customer order is internalized. In addition, the Commission believes that Primex may provide an opportunity for customer orders to be exposed to possible execution by market participants other than the Primex participant that brought the order to Primex. The Commission notes that its analysis of these issues may change in the context of Nasdaq's exchange application.

In addition, the Commission believes the proposal is consistent with Rule 19b-5(f)(1) under the Act,²⁷ because it has been submitted within two years after commencement of the operation of the System.

The Commission finds good cause for approving Amendment No. 1 of the proposed rule change prior to the thirtieth day after notice of the publication in the **Federal Register**. The language to be deleted by the amendment was inadvertently included; Amendment No. 1 reflects the current rules governing Primex's operation. The Commission also finds good cause for approving Amendment No. 2 of the proposed rule change prior to the thirtieth day after notice of the publication in the **Federal Register**. Amendment No. 2 also reflects the current rules governing Primex's operation. In addition, Amendment No. 2 removes a disincentive to participation in Primex by deleting a programming requirement associated with an end-of-day anonymity feature; assists participants in complying with the Short Sale Rule by adding a useful feature that prevents violative orders from executing on the System; promotes opportunities for greater order interaction and possible price improvement by allowing unexecuted Primex orders to be routed to SuperMontage; and enhances Primex as a potential order-routing destination by providing firms with additional time to program their internal systems to accommodate Primex. The Commission also finds good cause for approving Amendment No. 3 of the proposed rule change prior to the thirtieth day after notice of the publication in the **Federal Register**. Amendment No. 3 also reflects the current rules governing Primex's operation. In addition, Amendment No. 3 assists participants in complying with the Short Sale Rule and removes a

disincentive to participation in Primex by implementing a less restrictive minimum size requirement for PRIs. The Commission believes Amendment Nos. 1, 2, and 3 are consistent with Sections 15A(b)(6) and (11), and 11A(a)(1)(C) of the Act,²⁸ and Rule 19b-5 under the Act,²⁹ and therefore the approval of Amendment Nos. 1, 2, and 3 on an accelerated basis is appropriate.

Interested persons are invited to submit written data, views, and arguments concerning Amendment Nos. 1, 2, and 3, including whether the proposed amendments are 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 amendments that are filed with the Commission, and all written communications relating to the amendments 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 at the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR-NASD-2002-60 and should be submitted by March 12, 2003.

VIII. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,³⁰ that the proposed rule change (SR-NASD-2002-60) is approved and Amendment Nos. 1, 2, and 3 are approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.³¹

Margaret H. McFarland,

Deputy Secretary.

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²⁸ 15 U.S.C. 78o-3(b)(6) and (11), and 15 U.S.C. 78k-1(a)(1)(C).

²⁹ 17 CFR 240.19b-5.

³⁰ 15 U.S.C. 78s(b)(2).

³¹ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47350; File No. SR-NASD-2003-16]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Listing and Trading of the Dreyer's Grand Ice Cream Holdings, Inc. Callable Puttable Common Stock

February 11, 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 February 6, 2003, 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 ("Commission" or "SEC") 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 and to approve the proposal on an accelerated basis.

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

Nasdaq proposes to list and trade the Dreyer's Grand Ice Cream Holdings, Inc. ("New Dreyer's") class A callable puttable common stock ("Common Stock").

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 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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

²⁷ 17 CFR 240.19b-5(f)(1).

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

1. Purpose

Nasdaq proposes to list for trading the New Dreyer's Common Stock under NASD Rule 4420(f). Under NASD Rule 4420(f), Nasdaq may approve for listing and trading innovative securities which cannot be readily categorized under traditional listing guidelines.³ Nasdaq believes that it is appropriate to list the New Dreyer's Common Stock under NASD Rule 4420(f) because it combines the features of more than one category of currently listed securities, specifically common stock with a put right and a call right.⁴

Dreyer's Grand Ice Cream, Inc. ("Dreyer's") has entered into an Agreement and Plan of Merger and Contribution ("Merger Agreement") with Nestle Holdings, Inc. ("Nestle") and its affiliates to combine Dreyer's with Nestle's United States frozen dessert business. The combination will result in both Dreyer's and Nestle Ice Cream Company, LLC, which holds Nestle's United States frozen dessert business, becoming wholly-owned subsidiaries of a newly formed Delaware corporation, which is named New December, Inc. ("New December") and which will be renamed New Dreyer's.⁵

As described in the registration statement filed by New December, if the transactions contemplated by the Merger Agreement are completed, the public shareholders of Dreyer's will receive the New Dreyer's Common Stock. Each holder of the New Dreyer's Common Stock will have the option to require New Dreyer's to redeem out of legally available funds all or part of the New Dreyer's Common Stock held by the holder at a price of \$83.00 per share during each of the following put periods: (1) The period beginning on December 1, 2005 and ending on January 13, 2006; and (2) the period beginning on April 3, 2006 and ending on May 12, 2006. Prior to the start of each put period, New Dreyer's will be required to give notice of the availability of the put right to the holders of the New Dreyer's Common Stock. Notwithstanding the foregoing, New Dreyer's will be relieved of its

redemption obligations in respect of any put right upon the occurrence of a triggering event, which means either a substantial adverse change determination or an insolvency event as described in the registration statement. During the call period beginning on January 1, 2007 and ending on June 30, 2007, the New Dreyer's Common Stock may be redeemed by New Dreyer's out of legally available funds, in whole but not in part, at a price of \$88.00 per share, upon Nestle's request.

As set forth in the registration statement, prior to the expiration of the two put periods, the existence of the put right will likely be influential in determining the market price at which the New Dreyer's Common Stock will trade. However, the market price of the New Dreyer's Common Stock is not guaranteed at the completion of the transactions or thereafter, and may be adversely affected in the event that the ability of the New Dreyer's Common Stock holders to exercise the put right or to receive proceeds upon exercise of the call right is impaired or diminished. Moreover, after the expiration of the two put periods, the market price of the Common Stock, to the extent still outstanding, may decline significantly. Although Nestle is prohibited from proposing a business combination transaction during the period beginning on July 1, 2007 and ending on July 1, 2008 at a price lower than \$88.00 per share of the New Dreyer's Common Stock, there are no price protections for business combination transactions after July 1, 2008.

Furthermore, at the expiration of the call period on July 1, 2007, the New Dreyer's Common Stock will convert into New Dreyer's class B common stock and Nestle will no longer be contractually restricted from controlling more than 50% of the New Dreyer's board of directors, and may use its controlling vote as a New Dreyer's stockholder to elect any number or all of the members of New Dreyer's board of directors. Also, after July 1, 2007, Nestle will have no restrictions on its ability to sell or transfer its New Dreyer's Common Stock on the open market, in privately negotiated transactions or otherwise, and these sales or transfers could create a substantial decline in the price of the outstanding shares of the New Dreyer's Common Stock or, if these sales or transfers were made to a single buyer or group of buyers, could transfer control of New Dreyer's to a third party.

In addition, the existence of the call right may prevent the New Dreyer's Common Stock from trading above the call price of \$88.00 per share even if

New Dreyer's future growth and/or market conditions were to otherwise warrant a per share valuation in excess of that price. If the call right is exercised, the Common Stock holders would participate in this increased valuation only to the extent of the \$88.00 per share of the Common Stock redemption price.

Upon the occurrence of a triggering event, the New Dreyer's Common Stock will be redeemed, in whole but not in part, at a price per share equal to the triggering event price. The triggering event price will be determined on the basis of a discount to the put price of \$83.00 per share of the New Dreyer's Common Stock and will depend on the date of the triggering event. Upon New Dreyer's receipt of a written request from Nestle for the redemption of the New Dreyer's Common Stock under the call right, including in connection with a triggering event, New Dreyer's will be required to give notice of the exercise of the call right and the redemption of the Common Stock to New Dreyer's Common Stock holders.

The New Dreyer's Common Stock will initially be subject to Nasdaq's listing criteria for other securities under NASD Rule 4420(f). Specifically, under NASD Rule 4420(f)(1):

(A) The issuer shall have assets in excess of \$100 million and stockholders' equity of at least \$10 million. In the case of an issuer which is unable to satisfy the income criteria set forth in paragraph (a)(1), Nasdaq generally will require the issuer to have the following: (i) assets in excess of \$200 million and stockholders' equity of at least \$10 million; or (ii) assets in excess of \$100 million and stockholders' equity of at least \$20 million;

(B) There must be a minimum of 400 holders of the security, provided, however, that if the instrument is traded in \$1,000 denominations, there must be a minimum of 100 holders;

(C) For equity securities designated pursuant to this paragraph, there must be a minimum public distribution of 1,000,000 trading units; and

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

In addition, New Dreyer's will satisfy the listed marketplace requirement set forth in NASD Rule 4420(f)(2).⁶ Lastly, pursuant to NASD Rule 4420(f)(3), prior

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

⁴ *Id.*; see also Securities Exchange Act Release No. 32378 (May 27, 1993), 58 FR 31770 (June 4, 1993).

⁵ For further information regarding the Merger Agreement, see the registration statement filed by New December with the Commission (File No. 333-101052).

⁶ NASD Rule 4420(f)(2) requires issuers of securities designated pursuant to this paragraph to be listed on Nasdaq or the New York Stock Exchange ("NYSE") or be an affiliate of a company listed on Nasdaq or the NYSE; provided, however, that the provisions of NASD Rule 4450 will be applied to sovereign issuers of "other" securities on a case-by-case basis.

to the commencement of trading of the New Dreyer's Common Stock, Nasdaq will distribute a circular to members providing guidance regarding the features of the Common Stock and members' responsibilities (including suitability recommendations) when handling transactions in callable puttable common stock and highlighting the characteristics and risks of the Common Stock. In particular, Nasdaq will inform members that customer confirmations involving the New Dreyer's Common Stock should identify the security as a callable and puttable instrument and that a customer may contact the member for more information concerning the security.⁷ Furthermore, given the put and call features of the Common Stock, the circular will indicate that Nasdaq suggests that transactions in the Common Stock be recommended only to investors whose accounts have been approved for options trading. If a customer has not been approved for options trading, or does not wish to open an options account, the member should ascertain whether the Common Stock is suitable for the customer. Pursuant to NASD Rule 2310 and IM-2310-2, 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. In addition, members recommending a transaction in the Common Stock must, among other things, have a reasonable basis for believing that the customer can evaluate the special characteristics of, and is able to bear the financial risks of, such transaction.

The New Dreyer's Common Stock will be subject to Nasdaq's continued listing criterion for other securities pursuant to NASD Rule 4450(c). Under this criterion, the aggregate market value or principal amount of publicly-held units must be at least \$1 million. The Common Stock also must have at least two registered and active market makers as required by NASD Rule 4310(c)(1).

Nasdaq represents that NASD's surveillance procedures are adequate to properly monitor the trading of the Common Stock. Specifically, NASD will rely on its current surveillance procedures governing equity securities.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with Section 15A of the Act,⁸ in general, and furthers the objectives of Section 15A(b)(6) of the Act,⁹ in particular, in that it 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.

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 number SR-NASD-2003-16 and should be submitted by March 12, 2003.

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

Nasdaq requests that the Commission approve this filing on an accelerated basis because Nasdaq believes that the

proposal does not raise any novel issues. 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, with the requirements of Section 15A(b)(6) of the Act¹⁰ in that it 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, in general, to protect investors and the public interest.¹¹

The Commission notes that the New Dreyer's Common Stock has both callable and puttable features. In particular, shareholders of Dreyer's will receive the Common Stock, subject to the completion of certain transactions in the Merger Agreement, with the option of redeeming all or part of their Common Stock at a price of \$83.00 per share during two put periods: (1) The period between December 1, 2005 and January 13, 2006; and (2) the period between April 3, 2006 and May 12, 2006. However, as described in the registration statement, New Dreyer's would be relieved of its redemption obligations upon the occurrence of a substantial adverse change determination or an insolvency event. In addition, the Commission notes that New Dreyer's will retain an option to call the shares of Common Stock, upon Nestle's request, during the period between January 1, 2007 and June 30, 2007, in whole but not in part, at a price of \$88.00 per share.

Because of the Common Stock's callable and puttable features, there are several issues regarding trading of this type of hybrid product. For the reasons discussed below, the Commission believes that Nasdaq's proposal adequately addresses the concerns raised by this type of product.

The Commission notes that the protections of NASD Rule 4420(f) were designed to address the concerns attendant to the trading of hybrid securities like the New Dreyer's Common Stock.¹² In particular, by imposing the hybrid listing standards, heightened suitability for recommendations,¹³ and compliance

¹⁰ 15 U.S.C. 78o-3(b)(6).

¹¹ In approving the proposed rule, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹² See 1993 Order, *supra* note 3.

¹³ As discussed above, Nasdaq will advise members and employees thereof recommending a transaction in the Common Stock to: (1) Determine that the transaction is suitable for the customer; and (2) have a reasonable basis for believing that the customer can evaluate the special characteristics of,

⁷ See NASD IM-2110-6, Confirmation of Callable Common Stock.

⁸ 15 U.S.C. 78o-3.

⁹ 15 U.S.C. 78o-3(b)(6).

Continued

requirements, noted above, the Commission believes that Nasdaq has adequately addressed the potential problems that could arise from the hybrid nature of the Common Stock.

The Commission notes that Nasdaq will distribute a circular to its members that provides guidance regarding members' compliance responsibilities and requirements, including heightened suitability recommendations, when handling transactions in callable puttable common stock, and that highlights the special risks and characteristics associated with the Common Stock. Specifically, among other things, the circular will inform members that customer confirmations involving the New Dreyer's Common Stock should identify the security as a callable and puttable instrument and that a customer may contact the member for more information concerning the security. Nasdaq represents that the circular will also indicate that, given the put and call features of the Common Stock, Nasdaq will suggest that transactions in the Common Stock be recommended only to investors whose accounts have been approved for options trading. Nasdaq further represents that, if a customer has not been approved for options trading, or does not wish to open an options account, the member should ascertain whether the Common Stock is suitable for the customer pursuant to NASD Rule 2310 and IM-2310-2. The Commission believes that the distribution of the circular should help to ensure that only customers with an understanding of the risks attendant to the trading of the New Dreyer's Common Stock and who are able to bear the financial risks associated with transactions in the Common Stock will acquire and trade the Common Stock.

In addition, Nasdaq represents that the circular will identify the following specific risks associated with the Common Stock.¹⁴ The circular will note that members should inform customers that the price at which the New Dreyer's Common Stock will trade may be influenced, prior to the expiration of the two put periods, by the existence of the put right. The circular will also note that the final rate of return on the Common Stock may be less than the market price of the Common Stock, and that after the expiration of the two put

periods, the market price of the Common Stock may decline significantly. Furthermore, customers should be aware that after the expiration of the call period on July 1, 2007, the New Dreyer's Common Stock will be converted into New Dreyer's class B common stock, and that Nestle will no longer be held to certain controlling interest and sale restrictions, as discussed above. The Commission believes that to some extent the financial risk is minimized by the NASD's listing standards in NASD Rule 4420(f), which provide that only issuers satisfying substantial asset and equity requirements may issue these types of hybrid securities, and that the issuers of securities to be listed on Nasdaq or the NYSE or be an affiliate of a company listed on Nasdaq or the NYSE. In addition, the NASD's hybrid listing standards further require that the Common Stock have at least \$4 million in market value.

Furthermore, the Commission notes that Nasdaq represents that NASD's surveillance procedures for the Common Stock will be the same as its current surveillance procedures for equity securities, and that Nasdaq represents that such surveillance procedures are adequate for this product.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The Commission believes that granting accelerated approval of the proposal will facilitate the trading of New Dreyer's Common Stock. Accordingly, the Commission believes that there is good cause, consistent with Sections 15A(b)(6) and 19(b)(2) of the Act,¹⁵ to approve the proposal on an accelerated basis.

The Commission is approving Nasdaq's proposed listing standards for the New Dreyer's Common Stock. The Commission specifically notes that, notwithstanding approval of the listing standards for the Common Stock, other similarly structured products will require review by the Commission prior to being traded on Nasdaq.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-NASD-2003-16) is 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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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47356; File No. SR-OC-2003-01]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendments Nos. 1 and 2 Thereto by OneChicago, LLC Relating to Initial Listing Standards of Single Stock Futures

February 12, 2003.

Pursuant to section 19(b)(7) of the Securities Exchange Act of 1934 ("Act"),¹ and rule 19b-7 under the Act,² notice is hereby given that on January 23, 2003, OneChicago, LLC ("OneChicago" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule changes described in items I, II, and III below, which items have been prepared by OneChicago. On January 27, 2003, OneChicago filed Amendment No. 1 to the proposed rule change.³ On February 5, 2003, OneChicago filed Amendment No. 2 to the proposed rule change.⁴ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

OneChicago also has filed the proposed rule change with the Commodity Futures Trading Commission ("CFTC"). OneChicago filed a written certification with the CFTC under section 5c(c) of the

¹ 15 U.S.C. 78s(b)(7).

² 17 CFR 240.19b-7.

³ See letter dated January 24, 2003, from Madge M. Hamilton, Deputy General Counsel, OneChicago, to Florence Harmon, Senior Special Counsel, Division of Market Regulation, Commission ("Amendment No. 1"). In Amendment No. 1, the Exchange corrected technical errors in the proposed rule text and added proposed rule text that was inadvertently omitted in its initial filing.

⁴ See letter dated February 3, 2003, from Madge M. Hamilton, Deputy General Counsel, OneChicago, to Florence Harmon, Senior Special Counsel, Division of Market Regulation, Commission ("Amendment No. 2"). In Amendment No. 2, the Exchange amended section II.A.2 of the proposal to specify that the proposed rule change was consistent with section 6(b)(5) of the Act. In addition the Exchange amended section II.C of the proposal to state that the Exchange has not received any comments on the proposal.

and is able to bear the financial risk of, the transaction.

¹⁴ Telephone conversation between John Nachmann, Senior Attorney, Office of General Counsel, Nasdaq, and Florence Harmon, Senior Special Counsel, and Sapna C. Patel, Attorney, Division of Market Regulation, Commission, on February 11, 2003.

¹⁵ 15 U.S.C. 78o-3(b)(6) and 78s(b)(2).

¹⁶ 17 CFR 200.30-3(a)(12).