

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.