

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).

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