

Index will be reconstituted by the Amex so as to include the ten common stocks in the DJIA having the highest dividend yield on the second scheduled index business day prior to such anniversary date. Nasdaq represents that the Amex will announce such changes to investors at least one day prior to the anniversary date.<sup>12</sup>

The portfolio will be reconstituted and rebalanced on the anniversary date so that each stock in the Select Ten Index will represent 10% of the value of the Index. To effectuate this, Nasdaq states that the share multiplier for each new stock will be determined by the Amex and will indicate the number of shares or fractional portion thereof of each new stock, given the closing market price of such new stock on the anniversary date, so that each new stock represents an equal percentage of the Select Ten Index value at the close of business on such anniversary date. For example, if the Select Ten Index value at the close of business on an anniversary date was 200, then each of the ten new stocks comprising the Select Ten Index would be allocated a portion of the value of the Index equal to 20, and if the closing market price of one such new stock on the anniversary date was 40, the applicable share multiplier would be 0.5. Conversely, if the Select Ten Index value was 80, then each of the ten new stocks comprising the Select Ten Index would be allocated a portion of the value of the Select Ten Index equal to 8, and if the closing market price of one such new stock on the anniversary was 40, the applicable share multiplier would be 0.2. The last anniversary date on which such reconstitution will occur will be the anniversary date in the year preceding the maturity of the Notes. As noted above, investors will receive information on the new portfolio of securities comprising the Select Ten Index at least one day prior to each anniversary date.

The multiplier of each component stock in the Select Ten Index will remain fixed unless adjusted for quarterly dividend adjustments, annual reconstitutions or certain corporate events, such as payment of a dividend other than an ordinary cash dividend, a distribution of stock of another issuer to its shareholders,<sup>13</sup> stock split, reverse stock split, and reorganization.

<sup>12</sup> Nasdaq states that the Amex will publish a notice to advise investors of changes to the securities underlying the Index if any such changes are made following an annual reconstitution.

<sup>13</sup> If the issuer of a component security in the Select Ten Index issues to all of its shareholders publicly traded stock of another issuer, such new securities will be added to the portfolio comprising

The multiplier of each component stock may be adjusted, if necessary, in the event of a merger, consolidation, dissolution or liquidation of an issuer or in certain other events such as the distribution of property by an issuer to shareholders. If the issuer of a stock included in the Select Ten Index were to no longer exist, whether by reason of a merger, acquisition or similar type of corporate transaction, a value equal to the stock's final value will be assigned to the stock for the purpose of calculating the Select Ten Index value prior to the subsequent anniversary date. For example, if a company included in the Select Ten Index were acquired by another company, a value will be assigned to the company's stock equal to the value per share at the time the acquisition occurred. If the issuer of stock included in the Select Ten Index is in the process of liquidation or subject to a bankruptcy proceeding, insolvency, or other similar adjudication, such security will continue to be included in the Select Ten Index so long as a market price for such security is available or until the subsequent anniversary date. If a market price is no longer available for an Index stock due to circumstances including, but not limited to, liquidations, bankruptcy, insolvency, or any other similar proceeding, then the security will be assigned a value of zero when calculating the Select Ten Index for so long as no market price exists for that security or until the subsequent anniversary date. If the stock remains in the Select Ten Index, the multiplier of that security in the Select Ten Index may be adjusted to maintain the component's relative weight in the Select Ten Index at the level immediately prior to the corporate action. In all cases, the multiplier will be adjusted, if necessary, to ensure Select Ten Index continuity.

Nasdaq states that the Amex will calculate the Select Ten Index and, similar to other stock index values published by the Amex, the value of the Index will be calculated continuously and disseminated every fifteen seconds over the Consolidated Tape Association's Network B. The Index value will equal the sum of the products of the most recently available market prices and the applicable multipliers for the component securities. In the event that Amex discontinues the publication of the Select Ten Index, Nasdaq will

the Select Ten Index until the subsequent anniversary date. The multiplier for the new component will equal the product of the original issuer's multiplier and the number of shares of the new component issued with respect to one share of the original issuer.

facilitate the calculation and dissemination every 15 seconds of a value of a successor index either through the facilities of Nasdaq or those of an outside provider that is an independent calculation agent, unless otherwise approved by the Commission.<sup>14</sup> Amex could discontinue publication of the Select Ten Index, and Amex or another entity could publish a successor or substitute index that the calculation agent, in its sole discretion, could deem a comparable successor index. Also, Amex could discontinue publication of the Select Ten Index and the calculation agent could not select a successor index. In such case, the calculation agent will compute a substitute value for the Select Ten Index in accordance with the procedures last used to calculate the Select Ten Index before any discontinuance. If Amex discontinues publication of the Select Ten Index before the period during which the Redemption Amount is to be determined and the calculation agent determines that no successor index is available at that time, then on each business day until the earlier to occur of (1) the determination of the Ending Value or (2) a determination by the calculation agent that a successor index is available, the calculation agent will determine the value that would be used in computing the Redemption Amount as if that day were a calculation day.<sup>15</sup>

Since the Notes will be deemed equity securities for the purpose of Rule 4420(f), the NASD and Nasdaq's existing equity trading rules will apply to the Notes. First, pursuant to 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.<sup>16</sup> In addition, Nasdaq will distribute a circular to advise members recommending a transaction in the Notes to, among other things, have a reasonable basis for believing that the customer can evaluate the special characteristics of, and is able to bear the

<sup>14</sup> See Amendment No. 1, *supra* n. 3.

<sup>15</sup> Telephone conference between John Nachmann, Senior Attorney, Nasdaq, and Geoff Pemble, Special Counsel, Commission, dated February 20, 2003.

<sup>16</sup> Rule 2310(b) requires members to make reasonable efforts to obtain information concerning a customer's financial status, a customer's tax status, the customer's investment objectives, and such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer.