

MEMO# 16855

December 9, 2003

NASDAQ PROPOSED RULE CHANGE RELATING TO THE ESTABLISHMENT OF A NASDAQ OFFICIAL OPENING PRICE

[16855] December 9, 2003 TO: EQUITY MARKETS ADVISORY COMMITTEE No. 37-03 END OF DAY PRICING FORUM No. 12-03 TECHNOLOGY ADVISORY COMMITTEE No. 20-03 RE: NASDAQ PROPOSED RULE CHANGE RELATING TO THE ESTABLISHMENT OF A NASDAQ OFFICIAL OPENING PRICE The SEC has published for comment a proposed rule change filed by the Nasdaq Stock Market to establish a "Nasdaq Official Opening Price."¹ The most significant aspects of Nasdaq's proposal are summarized below. Comments on the proposed rule change must be received by the SEC no later than December 17, 2003. If you would have any comments on the proposed rule change, please provide them to the undersigned by phone at (202) 371-5408 or by e-mail at aburstein@ici.org no later than December 12. Nasdaq's proposal would establish an Official Opening Price for Nasdaq-listed securities, which would be available for voluntary use by NASD members and the public. The Nasdaq Official Opening Price would be equal to the reported price of the first trade executed in SuperMontage, which would be based upon orders that are in queue when SuperMontage begins trading at 9:30 a.m. Eastern ("SuperMontage Opening Match").² If there were no SuperMontage Opening Match within five seconds after SuperMontage opens at 9:30 a.m., the Nasdaq Official Opening Price for that security would be based upon the first, last sale eligible trade ("Predicate Trade") that is reported to Nasdaq's Automated Confirmation Transaction System ("ACT"). The Predicate Trade could be an internalized execution; a SuperMontage execution resulting from an order entered into the system after 9:30 a.m.; or a SuperMontage execution based on an order that was in queue in SuperMontage at 9:30 a.m. but not executed until after 9:30:05 a.m. as a result of being sent to an order delivery participant. 1 Securities Exchange Act Release No. 48810 (November 19, 2003), 68 FR 66518 (November 26, 2003) ("Release"). 2 SuperMontage executions that are in queue when SuperMontage begins trading at 9:30 a.m. but that are not executed until after 9:30:05 a.m. (as a result of being delivered to an order delivery participant that has not responded) would not be eligible to be the SuperMontage Opening Match. In addition, SuperMontage executions that result from orders entered into the system after 9:30 a.m. would not be eligible to be the SuperMontage Opening Match. 2 If the Nasdaq Official Opening Price were to be based upon a Predicate Trade rather than a SuperMontage Opening Match, Nasdaq would be able to use the same normalization process that currently applies to the Nasdaq Official Closing Price. According to the Release, Nasdaq believes that normalizing the Official Opening Price by bounding the first ACT trade report by the Nasdaq inside would reduce the extent to which market participants could deliberately affect the Nasdaq Official Opening Price. Ari Burstein Associate Counsel Attachment (in .pdf format)

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