

as a national securities exchange becomes effective contemporaneously with the submission of the written notice on Form 1-N.<sup>5</sup>

On August 22, 2002, OneChicago, LLC ("OneChicago") filed a Form 1-N with the Commission. Pursuant to section 6(g)(3) of the Exchange Act,<sup>6</sup> the Commission hereby acknowledges receipt of the Form 1-N submitted by OneChicago. Copies of the Form 1-N submitted by OneChicago, including all exhibits, are available in the Commission's Public Reference Room, File No. 10-133.

For questions regarding this Release, contact: Theodore Lazo, Senior Special Counsel at (202) 942-0745, or Jennifer Colihan, Special Counsel at (202) 942-0735; Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-1001.

By the Commission.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 02-26885 Filed 10-22-02; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[File No. 1-16079]

### Issuer Delisting; Notice of Application To Withdraw From Listing and Registration on the American Stock Exchange LLC; (PracticeWorks, Inc., Common Stock, \$.01 Par Value)

October 17, 2002.

PracticeWorks, Inc., a Delaware corporation ("Issuer"), has filed an application with the Securities and Exchange Commission ("Commission"), pursuant to Section 12(d) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 12d2-2(d) thereunder,<sup>2</sup> to withdraw its Common Stock, \$.01 par value ("Security"), from listing and registration on the American Stock Exchange LLC ("Amex" or "Exchange").

The Issuer stated in its application that it has met the requirements of Amex Rule 18 by complying with all applicable laws in effect in the State of Delaware, in which it is incorporated, and with the Amex's rules governing an issuer's voluntary withdrawal of a security from listing and registration.

supplied and whether all other required documents have been furnished in proper form. Exchange Act Rule 202.3(b)(3), 17 CFR 202.3(b)(3).

<sup>5</sup> Section 6(g)(2)(B) of the Exchange Act.

<sup>6</sup> 15 U.S.C. 78f(g)(3).

<sup>1</sup> 15 U.S.C. 78l(d).

<sup>2</sup> 17 CFR 240.12d2-2(d).

The Board of Directors ("Board") of the Issuer unanimously approved a resolution on August 13, 2002 to withdraw the Issuer's Security from listing on the Amex. The Issuer states that trading in the Security on the Nasdaq National Market commenced on October 1, 2002. The Issuer's application relates solely to the withdrawal of the Security from listing on the Amex and registration under section 12(b) of the Act<sup>3</sup> and shall not affect its obligation to be registered under section 12(g) of the Act.<sup>4</sup>

Any interested person may, on or before November 7, 2002, submit by letter to the Secretary of the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609, facts bearing upon whether the application has been made in accordance with the rules of the Amex and what terms, if any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>5</sup>

**Jonathan G. Katz,**  
*Secretary.*

[FR Doc. 02-26930 Filed 10-22-02; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[File No. 1-14760]

### Issuer Delisting; Notice of Application To Withdraw From Listing and Registration (RAIT Investment Trust, Common Stock of Beneficial Interest, \$.01 Per Share) From the American Stock Exchange LLC

October 17, 2002.

RAIT Investment Trust, a Maryland real estate investment trust ("Issuer"), has filed an application with the Securities and Exchange Commission ("Commission"), pursuant to Section 12(d) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 12d2-2(d) thereunder,<sup>2</sup> to withdraw its Common Stock of Beneficial Interest, \$.01 par value ("Security"), from listing and

<sup>3</sup> 15 U.S.C. 78l(b).

<sup>4</sup> 15 U.S.C. 78l(g).

<sup>5</sup> 17 CFR 200.30-3(a)(1).

<sup>1</sup> 15 U.S.C. 78l(d).

<sup>2</sup> 17 CFR 240.12d2-2(d).

registration on the American Stock Exchange LLC ("Amex" or "Exchange").

The Issuer stated in its application that it has met the requirements of Amex Rule 18 by complying with all applicable laws in State of Maryland, in which it is incorporated, and with the Amex's rules governing an issuer's voluntary withdrawal of a security from listing and registration.

The Board of Directors ("Board") of the Issuer unanimously approved a resolution on January 11, 2002 to withdraw the Issuer's Security from listing on the Amex. The Issuer states that the Security has traded on the New York Stock Exchange, Inc. ("NYSE") since January 2002. The Issuer's application relates solely to the withdrawal of the Security from listing on the Amex and shall not affect its listing on the NYSE or its obligation to be registered under Section 12(b) of the Act.<sup>3</sup>

Any interested person may, on or before November 7, 2002, submit by letter to the Secretary of the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609, facts bearing upon whether the application has been made in accordance with the rules of the Amex and what terms, if any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>4</sup>

**Jonathan G. Katz,**  
*Secretary.*

[FR Doc. 02-26929 Filed 10-22-02; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-25772; 812-12518]

### BLDRS Index Funds Trust, Series 1, et al.; Notice of Application

October 17, 2002.

**AGENCY:** Securities and Exchange Commission ("Commission").

**ACTION:** Notice of an application for an order under (a) section 6(c) of the Investment Company Act of 1940 (the "Act") for an exemption from sections 2(a)(32), 4(2), 14(a), 22(d), 24(d) and

<sup>3</sup> 15 U.S.C. 781(b).

<sup>4</sup> 17 CFR 200.30-3(a)(1).

26(a)(2)(C) of the Act and rule 22c-1 under the Act, (b) sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (2) of the Act, and (c) section 17(d) of the Act and rule 17d-1 under the Act to permit certain joint transactions.

*Applicants:* BLDRS Index Funds Trust, Series 1, 2, 3, 4, 5, 6 and 7 (the "Fund"), Nasdaq Financial Products Services, Inc. (together with its successors in interest,<sup>1</sup> and with any person, directly or indirectly, controlling, controlled by, or under common control with, Nasdaq Financial Products Services, Inc., "Sponsor"), and ALPS Distributors, Inc. ("Distributor").

*Summary of Application:* Applicants request an order that would permit the following: (a) The Fund, a unit investment trust ("UIT") with multiple series (each series, a "Trust") whose portfolios will consist of the component stocks of various specified indices (collectively, the "Benchmark Indices," and each, a "Benchmark Index"), to issue shares ("Trust Shares") that are only redeemable in Creation Unit aggregations (as defined below); (b) secondary market transactions in Trust Shares to occur at negotiated prices; (c) dealers to sell Trust Shares to purchasers in the secondary market unaccompanied by a prospectus when prospectus delivery is not required by the Securities Act of 1933 ("Securities Act"); (d) the Trust, rather than the Sponsor, to bear certain expenses associated with its creation and maintenance; (e) certain "affiliated persons" of the Trust to deposit securities into, and receive securities from, the Trust in connection with the purchase and redemption of Trust Shares; and (f) the Trust to reimburse the Sponsor for payment of an annual licensing fee to The Bank of New York ("BoNY"). The order also would exempt the Sponsor from the Act's requirement that it purchase, or place with others, \$100,000 worth of Trust Shares.

*Filing Dates:* The application was filed on May 15, 2001, and amended on October 15, 2002. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in this notice.

*Hearing or Notification of Hearing:* An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request,

personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on November 7, 2002, and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Applicants, c/o John L. Jacobs, Executive Vice President, The Nasdaq Stock Market, Inc., 1735 K Street, NW., Washington, DC 20006-1500.

**FOR FURTHER INFORMATION CONTACT:** Stacy L. Fuller, Senior Counsel, or Michael W. Mundt, Senior Special Counsel, at 202-942-0564 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549-0102 (telephone 202-942-8090).

#### Applicants' Representations

1. Each Trust is a unit investment trust that will be organized under the laws of the State of New York. Sponsor is a wholly owned subsidiary of The Nasdaq Stock Market, Inc. ("Nasdaq"). The Bank of New York ("BoNY") will act as trustee to the Trusts ("Trustee") pursuant to a trust agreement entered into by and between BoNY and the Sponsor (the "Trust Agreement"). Distributor is registered as a broker-dealer under the Securities Exchange Act of 1934 ("Exchange Act") and will serve, on an agency basis, as principal underwriter of the Trusts.

2. Each Trust will hold a portfolio of securities ("Portfolio Securities") consisting of substantially all of the securities in substantially the same weighting as the component securities of the Benchmark Index that it tracks (the "Index Securities"). There are seven initial Trusts. The Benchmark Indices for the seven initial Trusts (the "Initial Benchmark Indices") will be compiled by BoNY (the "BoNY Index Provider").<sup>2</sup> Pursuant to guidelines

adopted by BoNY for the Index Provider, the BoNY personnel involved in compiling the Benchmark Indices cannot include any BoNY employees who are members of the BoNY division that provides trustee services to the Trusts, any broker-dealer affiliated with BoNY, BoNY's asset management division, or BoNY's private banking group.

3. In the future, applicants may offer additional Trusts based on other Benchmark Indices ("Future Trusts"). Any Future Trust will (a) be organized under New York state law pursuant to a trust agreement substantially identical to the Trust Agreement, (b) be sponsored by the Sponsor, and (c) comply with the terms and conditions of the requested order. No entity that creates, compiles, sponsors or maintains a Benchmark Index will be an affiliated person, as defined in section 2(a)(3) of the Act, or an affiliated person of an affiliated person, of the Sponsor, Distributor or promoter of the Trust.

4. Trust Shares, units of beneficial interest in the Trusts, are designed to provide investors with an instrument that closely tracks the Benchmark Indices, trades like a share of common stock, and pays periodic dividends proportionate to those paid by the Portfolio Securities held by the Trust.<sup>3</sup> The Trustee will make adjustments to the Portfolio Securities to reflect changes made by the BoNY Index Provider to the composition and weighting of the Index Securities.<sup>4</sup> All adjustments to the Portfolio Securities will be made by the Trustee as set forth in the Trust Agreement and will be non-discretionary. Applicants state that the Trustee, consistent with its fiduciary

Telecom 35 ADR Index. The Initial Benchmark Indices are sub-indices of the BoNY ADR Index, which is an index of all U.S. exchange-listed Depository Receipts ("DRs"), subject to certain eligibility requirements. Applicants note that BoNY is a prominent participant in the DR market, and receives various fees and commissions in connection with its DR program functions. BoNY has informed applicants that the index compilation is bound by objective criteria, and that the identity of the depository bank for a DR is never a criterion in the selection of Index Securities. As discussed in the application, BoNY represents that its DR sales efforts are not coordinated with the compilation of the Benchmark Indices.

<sup>3</sup> The Trusts will make quarterly distributions when dividends on the Portfolio Securities and other income of the Trust, if any, exceed fees and expenses accrued by the Trust during the previous quarter. The Trustee may vary the frequency of dividend distributions under certain circumstances.

<sup>4</sup> The BoNY Index Provider determines, comprises and calculates Benchmark Indices without regard to any Trust. BoNY has instituted formal firewall procedures to ensure that no BoNY personnel involved in providing trustee services to the Trusts have access to information regarding changes to the Benchmark Indices prior to their public announcement.

<sup>1</sup> "Successors in interest" means any entity or entities that result from a reorganization into another jurisdiction, or a change in the type of business organization.

<sup>2</sup> The Initial Benchmark Indices are the (a) BoNY Asia 50 ADR Index, (b) BoNY Developed Markets 100 ADR Index, (c) BoNY Emerging Markets 50 ADR Index, (d) BoNY Europe 100 ADR Index, (e) BoNY Latin America 35 ADR Index, (f) BoNY International 100 Index, and (g) BoNY International

duties, may utilize a broker-dealer that is an "affiliated person," as defined in section 2(a)(3) of the Act, of the Trustee (each, an "Affiliated Broker-Dealer") in executing the transactions that are necessitated by the required adjustment(s). Applicants state that neither BoNY nor any Affiliated Broker-Dealer purchases or sells DRs on a principal basis, or intends to sell DRs or any other securities to any Trust on a principal basis. BoNY and its Affiliated Broker-Dealers would engage in transactions with a Trust on an agency basis only.<sup>5</sup>

5. Each Trust will pay the Trustee a fee ranging from 0.06% to 0.10% of the net asset value ("NAV") of the Trust on an annualized basis, such percentage to vary based on the NAV of the Trust. The Trustee in its discretion may waive all or any portion of such fee. Trust fees and expenses will be paid first out of income received by the Trust in the form of dividends and other distributions on Portfolio Securities.<sup>6</sup>

6. Pursuant to a license agreement ("License Agreement"), the BoNY Index Provider has granted Sponsor a license to use the Benchmark Indices and certain trademarks of BoNY. Sponsor will pay the BoNY Index Provider an annual licensing fee for each Benchmark Index and will seek reimbursement from each Trust for the fee charged in connection with its Benchmark Index. Sponsor will pay Distributor a flat annual fee for services provided to the Trusts. Sponsor will not seek reimbursement from any Trust for such payment without obtaining prior exemptive relief from the Commission.

7. Trust Shares will be issued in aggregations of 50,000 shares ("Creation Units"). The price of a Creation Unit for each of the initial Trusts will be approximately \$2,500,000. Orders to purchase Creation Units generally must be delivered to the Distributor through a party that has executed a participant agreement with the Distributor and Trustee, and is either (a) a participant in the Continuous Net Settlement System of the National Securities Clearing

Corporation ("NSCC," and the NSCC process of placing orders, the "Trust Shares Clearing Process"), or (b) a Depository Trust Company ("DTC") participant.

8. An investor wishing to purchase a Creation Unit from the Trust will have to transfer to the Trustee a "Portfolio Deposit," consisting of the following: (a) A portfolio of securities substantially similar in composition and weighting to the Index Securities ("Deposit Securities"); (b) a cash payment equal to the dividends accrued on the Portfolio Securities since the last dividend payment on the Portfolio Securities, net of expenses and liabilities ("Income Net of Expense Amount"); and (c) a cash payment or credit to equalize any differences between the market value of the Deposit Securities and the NAV of the Trust on a per Creation Unit basis ("Balancing Amount," and together with the Income Net of Expense Amount, the "Cash Component").<sup>7</sup> The Sponsor, or its designee, will make available on each business day a list of the names and the required number of shares of each of the Deposit Securities in the current Portfolio Deposit, as well as the Income Net of Expense Amount, effective through and including the previous business day, per outstanding Trust Share.<sup>8</sup> The Sponsor will make available on the Exchange, every 15 seconds of each business day, the sum of the Income Net of Expense Amount and the value of the Deposit Securities, on a per Trust Share basis. An investor making a Portfolio Deposit will be charged a service fee ("Transaction Fee") to be paid to the Trustee to defray the Trustee's costs in processing transactions for the Trust.<sup>9</sup>

<sup>7</sup> At the close of the market on each business day, the Trustee will calculate the NAV of each Trust, divide that amount by the total number of shares outstanding (yielding a "Per Trust Share NAV"), multiply the Per Trust Share NAV by the number of Trust Shares in a Creation Unit (e.g., 50,000), thereby calculating the NAV per Creation Unit. The Trustee will then calculate the required number of shares of Index Securities and the Cash Component that will comprise a Portfolio Deposit for the following business day.

<sup>8</sup> The cash equivalent of an Index Security may be included in the Cash Component of a Portfolio Deposit in lieu of the Index Security if (a) the Trustee determines that an Index Security is likely to be unavailable or available in insufficient quantity for inclusion in a Portfolio Deposit, or (b) a particular investor is restricted from investing or engaging in transactions in the Index Security (for example, when the investor is a broker-dealer restricted by regulation or internal policy from investing in securities issued by a company on whose board of directors one of its principals serves or when the investor is a broker-dealer and the security is on its "restricted list").

<sup>9</sup> The Transaction Fee will be \$10 per each security "name" (i.e., each security identified by a separate CUSIP number) in the Portfolio Deposit, rounded to the nearest \$500 per Participating Party

9. Orders to purchase Creation Units will be placed with the Distributor, who will be responsible for transmitting orders to the Trustee. The Distributor will issue confirmations of acceptance, issue delivery instructions to the Trustee to implement the delivery of Creation Units, and maintain records of the orders and the confirmations. The Distributor also will be responsible for delivering prospectuses to purchasers of Creation Units and may provide certain other administrative services.

10. Persons purchasing Creation Units from the Trust may hold the Trust Shares or sell some, or all, of them in the secondary market. Trust Shares will be listed either on a national securities exchange, as defined in section 2(a)(26) of the Act, or on the Nasdaq Stock Market, Inc. ("Nasdaq") with respect to National Market Securities as designated by Nasdaq pursuant to rule 11Aa3-1(6) under the Exchange Act, which is a subset of national market system securities, as defined by rule 11Aa2-1 under the Exchange Act (each, an "Exchange"). Trust Shares will be traded in the secondary market as individual units (i.e., in less than Creation Unit aggregations) in the same manner as other equity securities. Trust Shares of the initial Trusts will be listed on Nasdaq. The price of each Trust Share that trades on Nasdaq will be based on the current bid-offer market. Applicants expect the price of the initial Trust Shares trading on Nasdaq to be approximately \$50 per Trust Share. Transactions involving Trust Shares on Nasdaq will be subject to customary brokerage commissions and charges. Applicants expect that the price at which Trust Shares trade will be disciplined by arbitrage opportunities created by the continuous ability to purchase or redeem Creation Units at their NAV, which should ensure that Trust Shares will not trade at a material premium or discount in relation to their NAV.<sup>10</sup>

(as defined below) per day, regardless of the number of Creation Units purchased by such Participating Party on such day. "Participating Party" means an NSCC participant who may place orders through the Trust Shares Clearing Process. The Transaction Fee may be changed by the Trustee with the Sponsor's consent, but will not exceed 0.20% of the value of a Creation Unit. Investors who purchase Creation Units outside the Trust Shares Clearing Process will pay the Transaction Fee plus an amount not to exceed three times the Transaction Fee. The amount of the Transaction Fee will be disclosed in the prospectus for the Trust.

<sup>10</sup> Applicants do not anticipate any special liquidity issues as to constituents in the Initial Benchmark Indices, in light of the fact that constituent DRs are selected based on liquidity that is high relative to DRs that would otherwise fit the relevant criteria. The constituent DRs of the Initial

<sup>5</sup> BoNY has adopted firewall procedures that prohibit communications regarding changes or proposed changes to the Benchmark Indices between any Affiliated Broker-Dealer and the BoNY personnel involved in the compilation of the Benchmark Indices.

<sup>6</sup> Applicants expect that the income of the Trust may be insufficient to pay the fees and expenses of the Trust. In such circumstances, the Trustee will sell Portfolio Securities to generate sufficient cash to pay the Trust fees and expenses in excess of Trust income. The Trustee is ordinarily required to sell Portfolio Securities whenever the Trustee determines that accrued fees and expenses exceed dividends and other Trust accrued income on a projected basis by more than 0.01% of the NAV of the Trust.

11. Applicants expect that purchasers of Creation Units will include institutional investors and arbitrageurs, which could include institutional investors. Nasdaq market makers also may purchase Trust Shares in connection with their market making activities.<sup>11</sup> Applicants anticipate that several parties will act as market makers on Nasdaq, resulting in a highly efficient market for Trust Shares. Applicants expect that secondary market purchasers of Trust Shares will include both institutional and retail investors.<sup>12</sup>

12. Applicants will make available a standard Trust Shares product description ("Product Description") to members and member organizations of the relevant Exchange for distribution to investors purchasing Trust Shares in accordance with the Exchange's rules. The rules of the National Association of Securities Dealers ("NASD") require that NASD members distribute a Product Description to all purchasers of Trust Shares. The Product Description will provide a plain English overview of the relevant Trust, including the material risks and potential rewards of owning Trust Shares, and disclose the salient aspects of Trust Shares. The Product Description will advise investors that a prospectus for Trust Shares is available without charge upon request from the investor's broker or from the Distributor. Applicants believe that the volume of purchase transactions in which an investor will not receive a Product Description will not constitute a significant portion of the market activity in Trust Shares.

13. Trust Shares will not be individually redeemable, except upon termination of the Trust. Trust Shares will be redeemable in Creation Unit

Benchmark Indices are traded and priced on national securities exchanges and Nasdaq, as are the constituent securities of other indices on which exchange-traded funds investing in domestic securities are based. Accordingly, applicants believe that the pricing transparency for DRs should be equivalent to that of other securities that are traded and priced on national securities exchanges and Nasdaq. Because there are no apparent differences in the pricing transparency between DRs and such other equity securities, applicants believe that there will be no corresponding differences in, and no deleterious effects on, the arbitrage efficiency of the Trusts.

<sup>11</sup> The listing requirements established by Nasdaq require that at least two market makers be registered in Trust Shares in order for the Trust to maintain a listing on Nasdaq. Registered market makers must make a continuous two-sided market in a listing or face regulatory sanctions. No particular market maker will be contractually obligated to make a market in Trust Shares.

<sup>12</sup> Trust Shares will be registered in book-entry form only. DTC or its nominee will be the record owner of all outstanding Trust Shares. Beneficial ownership of Trust Shares will be shown on the records of DTC or its participants.

aggregations only. An investor redeeming a Creation Unit will receive a portfolio of securities typically identical in composition and weighting to the Deposit Securities as of the date the redemption request was made ("Redemption Securities"). The redeeming investor may receive the cash equivalent of an Index Security (a) when the Trustee determines that an Index Security is likely to be unavailable or available in insufficient quantity for delivery by the Trust, or (b) upon the request of the redeeming investor (because, for example, the redeeming investor is restricted by regulation or otherwise from holding an Index Security). The redeeming investor also may receive, or may pay, cash in an amount equal to the Cash Component in effect on the relevant business day for Portfolio Deposits ("Cash Redemption Amount"). The redeeming investor will pay a Transaction Fee, which will be calculated in the same manner as a Transaction Fee payable in connection with the purchase of a Creation Unit on the relevant business day.

14. Because each Trust will ordinarily redeem in kind, rather than in cash, the Trustee will not have to maintain cash reserves for redemptions. This will allow the assets of each Trust to be committed as fully as possible to tracking the relevant Benchmark Index, and allow each Trust to track the relevant Benchmark Index more closely than other market basket products that must allocate a portion of their assets to cash for redemptions.

#### Applicants' Legal Analysis

1. Applicants request an order under (a) section 6(c) of the Act granting an exemption from sections 2(a)(32), 4(2), 14(a), 22(d), 24(d) and 26(a)(2)(C) of the Act and rule 22c-1 under the Act, (b) sections 6(c) and 17(b) of the Act granting an exemption from sections 17(a)(1) and (2) of the Act, and (c) section 17(d) and rule 17d-1 under the Act to permit certain joint transactions.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction, or any class of persons, securities, or transactions, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

#### Sections 4(2) and 2(a)(32) of the Act

3. Section 4(2) of the Act defines a UIT as an investment company that, among other things, issues only redeemable securities. Section 2(a)(32)

of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer is entitled to receive approximately a proportionate share of the issuer's current net assets, or the cash equivalent. Because Trust Shares would not be individually redeemable, applicants request an order that would permit the Trust to register as a UIT and issue Trust Shares that are redeemable in Creation Units only. Applicants state that investors may purchase and redeem Trust Shares through the Trust in Creation Units. Applicants further state that, because the market price of Creation Units will be disciplined by arbitrage opportunities, investors should be able to sell individual Trust Shares in the secondary market at approximately NAV.

#### Section 14(a) of the Act

4. Section 14(a) of the Act provides, in pertinent part, that no registered investment company may make an initial public offering of its securities unless it has a net worth of at least \$100,000, or provision is made in connection with the registration of its securities that (a) firm agreements to purchase \$100,000 of its securities will have been made by not more than 25 persons, and (b) all proceeds, including sales loads, will be refunded to investors if the investment company's net worth is less than \$100,000 within 90 days after the effective date of the registration statement. Applicants state that section 14(a) was designed to address the formation of undercapitalized investment companies.

5. Rule 14a-3 under the Act exempts from section 14(a) UITs that invest only in "eligible trust securities," which do not include equity securities, subject to certain safeguards, including the refund of any sales load collected from investors. Applicants will comply in all respects with rule 14a-3, except that the Trust will not restrict its investments to "eligible trust securities" and the Trustee will not refund the Transaction Fee. Applicants contend that the Trust's investment in equity securities does not negate the effectiveness of the rule's safeguards nor subject investors to any greater risk of loss due to investment in an undercapitalized investment company. With respect to the Transaction Fee, applicants assert that it is not a sales load in that it is not a profit-based amount representing compensation to the Sponsor, but rather reimbursement of settlement costs incurred by the Trustee in connection with Portfolio Deposits. Applicants note that the Transaction Fee will be paid not

by retail investors, but by institutional and other well-capitalized investors who can afford the purchase price of a Creation Unit, who are more sophisticated, and who do not require the protections of section 14(a).

*Section 22(d) of the Act and Rule 22c-1 Under the Act*

6. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security that is being currently offered to the public by or through an underwriter, except at the current public offering price described in the prospectus. Rule 22c-1 under the Act generally requires that a dealer selling, redeeming, or repurchasing a redeemable security do so only at a price based on its NAV next computed after receipt of a tender of the security for redemption or of an order to purchase or sell the security. Applicants state that secondary market trading in Trust Shares will take place at negotiated prices, not at a current offering price described in the prospectus and not at a price based on NAV. Thus, purchases and sales of Trust Shares in the secondary market will not comply with section 22(d) and rule 22c-1, and applicants request an exemption from these provisions.

7. Applicants maintain that, while there is little legislative history regarding section 22(d), its provisions and those of rule 22c-1 appear to have been designed to (a) prevent dilution caused by certain riskless trading schemes by principal underwriters and contract dealers, (b) prevent unjust discrimination or preferential treatment among buyers, and (c) assure an orderly distribution of shares by eliminating price competition from dealers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price. Applicants believe that none of these purposes will be thwarted by permitting Trust Shares to trade in the secondary market at negotiated prices. Applicants state that secondary market trading in Trust Shares does not involve the Trust and cannot, therefore, result in dilution of Trust assets. Applicants also state that, to the extent different prices exist during a trading day, or from day to day, for Trust Shares, such variances occur as a result of third-party market forces, such as supply and demand, and not as a result of unjust or discriminatory manipulation. Therefore, applicants assert that secondary market transactions in Trust Shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants contend that the proposed distribution system will be orderly

because arbitrage activity will ensure that the difference between the market price of Trust Shares and their NAV remains narrow.

*Section 24(d) of the Act*

8. Section 24(d) of the Act provides, in pertinent part, that the prospectus delivery exemption provided to dealer transactions by section 4(3) of the Securities Act does not apply to any transaction in a redeemable security issued by a UIT. Applicants request an exemption from section 24(d) to permit dealers in Trust Shares to rely on the prospectus delivery exemption provided by section 4(3) of the Securities Act.<sup>13</sup>

9. Applicants state that the secondary market for Trust Shares is significantly different from the typical secondary market for UIT securities, which is usually maintained by the sponsor of the UIT. Trust Shares will be listed on an Exchange and will be traded in a manner similar to the shares of common stock issued by operating companies and closed-end investment companies. Dealers selling shares of operating companies and closed-end investment companies in the secondary market are generally not required to deliver a prospectus to a purchaser.

10. Applicants contend that Trust Shares, as a listed security, merit a reduction in the compliance costs and regulatory burdens resulting from the imposition of prospectus delivery obligations in the secondary market. Because Trust Shares will be exchange-listed, prospective investors will have access to several types of market information about the product. Applicants state that quotations, last

<sup>13</sup> Applicants are not seeking relief from the prospectus delivery requirement for non-secondary market transactions, including purchases of Creation Units or those involving an issuer. Applicants state that persons purchasing Creation Units will be cautioned in the prospectus that some activities on their part may, depending on the facts and circumstances, result in their being deemed statutory underwriters and subject them to the prospectus delivery and liability provisions of the Securities Act. For example, a broker-dealer firm and/or its client may be deemed a statutory underwriter if it takes Creation Units after placing an order with the Distributor, breaks them down into the constituent Trust Shares, and sells Trust Shares directly to its customers, or if it chooses to couple the purchase of a supply of new Trust Shares with an active selling effort involving solicitation of secondary market demand for Trust Shares. The prospectus will state that whether a person is an underwriter depends upon all the facts and circumstances pertaining to that person's activities. The prospectus will also state that dealers who are not "underwriters" but are participating in a distribution (as contrasted to ordinary secondary market trading transactions), and thus dealing with Trust Shares that are part of an "unsold allotment" within the meaning of section 4(3)(C) of the Securities Act, would be unable to take advantage of the prospectus delivery exemption provided by section 4(3) of the Securities Act.

sale price, and volume information will be continually available on a real-time basis through the consolidated tape and will be available throughout the day on broker's computer screens and other electronic services. The previous day's price and volume information also will be published in the financial section of newspapers. The Sponsor will publish daily, on a per Trust Share basis, the Income Net of Expense Amount. Applicants also provide that the Fund's Web site will contain quantitative information, updated on a daily basis, regarding the previous business day's NAV and the reported closing price. The Web site also will include for each Trust, a calculation of the premium or discount of the closing price against NAV and data, in chart format, displaying the frequency distribution of discounts and premiums of the closing price against the NAV, within appropriate ranges, for each of the four previous calendar quarters.

11. In addition, secondary market purchasers generally will receive the Product Description. Applicants state that, while the Product Description is not intended as a substitute for a prospectus, it will contain pertinent information about Trust Shares. Applicants also note that Trust Shares will be understandable to retail investors as a product that tracks the Benchmark Indices.

*Section 26(a)(2)(C) of the Act*

12. Section 26(a)(2)(C) of the Act requires, among other things, that a UIT's trust indenture prohibit payments to the trust's depositor (in the case of a Trust, the Sponsor), and any affiliated person of the depositor, except payments for performing certain administrative services. Applicants request an exemption from section 26(a)(2)(C) to permit any Trust to reimburse the Sponsor for certain licensing, registration, and marketing expenses.

13. Applicants state that, ordinarily, a sponsor of a UIT has an opportunity to profit in connection with the creation of a trust in two ways—through the difference between the acquisition cost of the securities and their value on the date of deposit in the trust and, to the extent a secondary market is maintained for units, through the imposition of sales charges on resales of units. Expenses normally incurred in the creation and maintenance of a trust can then be offset against such profits. Applicants assert, however, that under the proposed structure, the usual sources of income are not available because the Sponsor will not impose a sales load or deposit Index Securities

into the Trust. Though the Trusts will be listed on Nasdaq (the parent company of Sponsor), which will receive trading fees in connection with the trading of Trust Shares on Nasdaq, the Sponsor will not be involved in the maintenance of a secondary market for Trust Shares. Applicants contend that motivation for the limitations imposed in section 26(a)(2)(C) of the Act was the fear that sponsors could take unfair advantage of a trust to profit, when profits were already being generated through sales charges and market gains (on the securities deposited by the sponsor). Applicants contend that in the proposed structure, no such opportunity to profit exists for Sponsor.

14. Applicants state that permitting a Trust to reimburse the Sponsor for the Trust's expenses, as discussed above, would be no more disadvantageous to the holders of Trust Shares than allowing the expenses to be imposed indirectly as offsets to sales loads and other charges, as is done by typical UITs. Applicants state that a Trust will pay the Sponsor only its actual out-of-pocket expenses. Finally, applicants state that the payment is capped at 30 basis points of the Trust's NAV on an annualized basis, with any expenses in excess of that amount to be absorbed by the Sponsor.

#### *Section 17(a) of the Act*

15. Section 17(a) of the Act generally prohibits an affiliated person of a registered investment company, or an affiliated person of such person, from selling any security to or purchasing any security from, the investment company. Section 2(a)(3) defines "affiliated person" to include any person directly or indirectly owning, controlling, or holding with power to vote, 5% or more of the outstanding voting securities of the other person, and any person controlling, controlled by or under common control with the other person. Section 2(a)(9) provides that a control relationship will be presumed where one person owns 25% or more of another person's voting securities. Applicants state that, because the definition of "affiliated person" includes any person owning 5% or more, or more than 25%, of an issuer's outstanding voting securities, every purchaser of a Creation Unit will be an affiliated person of the Trust so long as 20 or fewer Creation Units are in existence. Applicants request an exemption from section 17(a) under section 6(c) and 17(b) to permit persons that are affiliated persons solely by virtue of a 5% or more, or more than 25%, ownership interest in a Trust (or affiliated persons of such persons that

are not otherwise affiliated with the Trusts) to purchase and redeem Creation Units through in-kind transactions.

16. Section 17(b) authorizes the Commission to exempt a proposed transaction from section 17(a) if the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching, and the proposed transaction is consistent with the policies of the registered investment company and with the general provisions of the Act. Applicants assert that no useful purpose would be served by prohibiting the affiliated persons described above from making in-kind purchases and redemptions of Creation Units. The composition of a Portfolio Deposit made by a purchaser, like the Redemption Securities and Cash Redemption Amount given to a redeeming investor, will be the same regardless of the investor's identity, and will be valued under the same objective standards applied to valuing the Portfolio Securities in connection with determining the Trust's NAV. Therefore, applicants state that in-kind purchases and redemptions will afford no opportunity for the affiliated persons described above to effect a transaction detrimental to other holders of Trust Shares. Applicants also believe that in-kind purchases and redemptions will not result in abusive self-dealing or overreaching by affiliated persons of the Funds.

#### *Section 17(d) of the Act and Rule 17d-1 Under the Act*

17. Section 17(d) of the Act and rule 17d-1 under the Act prohibit any affiliated person of, or principal underwriter for, a registered investment company, or any affiliated person of the affiliated person or the principal underwriter, acting as principal, from effecting any transaction in connection with any joint enterprise or other arrangement or profit-sharing plan in which the investment company participates, unless an application regarding the joint transaction has been filed with the Commission and granted by order. Under rule 17d-1, in passing upon such applications, the Commission considers whether the participation of the registered investment company in the joint transaction is consistent with the provisions, policies and purposes of the Act and the extent to which such participation is on a basis different or less advantageous than that of other participants.

18. Section 2(a)(3)(F) of the Act defines an "affiliated person" of another person to include, in the case of an

unincorporated investment company not having a board of directors, its depositor. Applicants state that the Sponsor may be deemed to be an affiliated person of a Trust because it will bear all aspects of the role of depositor in structuring and creating the Trust, other than that of actually depositing Portfolio Securities into the Trust.

19. Applicants request an order under rule 17d-1 that would permit a Trust to reimburse the Sponsor for the payment to the BoNY Index Provider of an annual license fee under the License Agreement. Applicants believe that relief is necessary because the Trust's undertaking to reimburse the Sponsor might be deemed a joint enterprise or other joint arrangement in which the Trust is a participant, in contravention of section 17(d) and rule 17d-1.

20. The License Agreement allows applicants to use the Benchmark Indices as bases for Trust Shares and to use certain of BoNY's trade name and trademark rights. Applicants believe that BoNY is a valuable name that is well-known to investors and believe that investors will desire to invest in instruments that closely mirror the Benchmark Indices. In view of this, applicants state that it is necessary to obtain from BoNY the License Agreement so that appropriate reference to BoNY may be made in materials describing Trust Shares and the Trust. Applicants assert that the terms and provisions of the License Agreement are comparable to the terms and provisions of other similar license agreements and that the annual license fee is for fair value, is in an amount comparable to that which would be charged by the BoNY Index Provider for similar arrangements, and is in an amount comparable to that charged by licensors in connection with the formation of other UITs based on other indices. For these reasons, applicants state that the proposed license fee arrangement satisfies the standards of section 17(d) and rule 17d-1.

#### **Applicants' Conditions**

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. Applicants will not register a Future Trust by means of filing a post-effective amendment to the Trust's registration statement or by any other means, unless (a) applicants have requested and received with respect to such Future Trust, either exemptive relief from the Commission or a no action letter from the Division of Investment Management of the Commission, or (b) the Future Trust will

be listed on an Exchange without the need for filing pursuant to rule 19b-4 under the Exchange Act.

2. The prospectus and the Product Description of each Trust will clearly disclose that, for purposes of the Act, Trust Shares are issued by that Trust and the acquisition of Trust Shares by investment companies is subject to the restrictions of section 12(d)(1) of the Act.

3. As long as a Trust operates in reliance on the requested order, the Trust Shares will be listed on an Exchange.

4. The Web site for the Trusts, which will be publicly accessible at no charge, will contain the following information, on a per Trust Share basis, for each Trust: (a) The prior business day's NAV and the reported closing price, and a calculation of the premium or discount of such price against such NAV; and (b) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. In addition, the Product Description for each Trust will state that the Web site for the Trusts has information about the premiums and discounts at which the Trust Shares have traded.

5. The prospectus and annual report for each Trust will also include: (a) the information listed in condition 4(b) above, (i) in the case of the prospectus, for the most recently completed year (and the most recently completed quarter or quarters, as applicable), and (ii) in the case of the annual report, for the immediately preceding five years, as applicable; and (b) the following data, calculated on a per Trust Share basis for one, five and ten year periods (or life of the Trust), (i) the cumulative total return and the average annual total return based on NAV and market price, and (ii) the cumulative total return of the relevant Benchmark Index.

6. Before a Trust may rely on the order, the Commission will have approved pursuant to rule 19b-4 under the Exchange Act, an Exchange rule requiring Exchange members and member organizations effecting transactions in Trust Shares to deliver a Product Description to purchasers of Trust Shares.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Margaret H. McFarland,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46666; File No. SR-MSRB-2002-09]

### Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of the Proposed Rule Change Relating to Arbitration

October 16, 2002.

On August 19, 2002, pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> the Municipal Securities Rulemaking Board ("Board" or "MSRB") filed with the Securities and Exchange Commission ("Commission" or "SEC") a proposed rule change (File No. SR-MSRB-2002-09). The proposed rule change relates to MSRB Rule G-35, on arbitration.

The Commission published the proposed rule change for comment in the **Federal Register**, September 9, 2002.<sup>3</sup> The Commission did not receive any comment letters relating to the forgoing proposed rule change.

#### I. Description of the Proposed Rule Change

In 1997, the MSRB amended Rule G-35, on arbitration, to provide that it would not accept any new arbitration claims filed on or after January 1, 1998 (the "1997 amendments").<sup>4</sup> The MSRB noted that any customer or securities dealer with a claim, dispute or controversy against a broker, dealer or municipal securities dealer ("dealer") involving its municipal securities activities may submit that claim to the arbitration forum of any self-regulatory organization ("SRO") of which the dealer is a member, including the National Association of Securities Dealers, Inc. ("NASD"). Bank dealers, however, are unique in that they are subject to the MSRB's rules but are not members of any other SRO. Thus, it was necessary to provide an alternative arbitration forum for claims involving the municipal securities activities of bank dealers. The 1997 amendments accomplished this by providing that as of January 1, 1998 every bank dealer, as defined in Rule D-8,<sup>5</sup> shall be subject to the NASD's Code of Arbitration

Procedure (the "NASD's Code") for every claim, dispute or controversy arising out of or in connection with the municipal securities activities of the bank dealer acting in its capacity as such. Furthermore, the 1997 amendments required that bank dealers abide by the NASD's Code as if they were "members" of the NASD for purposes of arbitration.

At the time of the 1997 amendments, the MSRB stated that it would "continue to operate its program in order to administer its current, open cases and any new claims received prior to January 1, 1998, but will discontinue administering its arbitration program when all such cases have been closed."<sup>6</sup> The MSRB further stated that, at such time, it would submit a filing to the Commission to delete sections 1 through 37 of Rule G-35, and rescind Rule A-16, on arbitration fees and deposits.<sup>7</sup> On May 14, 2002, the MSRB transferred its final, open arbitration case to the NASD. There are no further arbitration cases pending before the MSRB. Accordingly, the MSRB submitted the proposed rule change to delete sections 1 through 37 of Rule G-35, on arbitration, and to rescind Rule A-16, on arbitration fees and deposits. The proposed rule change also incorporates by reference into Rule G-35 changes to the NASD's Code.<sup>8</sup> The MSRB notes that any customer or securities dealer with a claim, dispute or controversy against a bank dealer involving its municipal securities activities may continue to submit that claim to the NASD's arbitration program.

As noted in the 1997 amendments, the MSRB deems it no longer appropriate to administer an arbitration program. All non-bank dealers engaged in municipal securities activities are members of the NASD, and the NASD's arbitration program is available to those dealers and their customers for any claim, dispute or controversy arising out of, or in connection with, the municipal securities activities of such dealers. The MSRB believes that the proposed rule change provides for the protection of investors and the public interest including those investors who wish to

<sup>6</sup> File No. SR-MSRB-1997-04 at page 2.

<sup>7</sup> *Id.* at page 3.

<sup>8</sup> In April 2002, at the request of the SEC's Division of Market Regulation, the MSRB requested that, pursuant to section 36 of the Act and Rule 0-12 thereunder, the SEC grant an exemption from the requirements of section 19(b) of the Act and Rule 19b-4 thereunder to allow the MSRB to incorporate by reference into Rule G-35 any changes to the NASD's Code without requiring that the MSRB submit a separate filing for each such change. See letter from Diane G. Klinke, General Counsel, MSRB, to Jonathan G. Katz, Secretary, SEC, dated April 4, 2002.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Release No. 34-46440 (August 30, 2002), 67 FR 57255.

<sup>4</sup> File No. SR-MSRB-1997-04, approved in Release No. 34-39378 (Dec. 1, 1997).

<sup>5</sup> Rule D-8 defines "bank dealer" to mean a municipal securities dealer which is a bank or a separately identifiable department or division of a bank as defined in Rule G-1.