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Mr. Jonathan Katz  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-9303

VIA E-Mail [rule-comments@sec.gov](mailto:rule-comments@sec.gov)  
SR-NASD-2005-086

Dear Mr. Katz,

I am writing to comment on the Proposed Rule Change to Amend Article VIII of the By-Laws of NASD Regulation, Inc. ("NASD") Relating to District Committees and District Nominating Committees that the Commission has already declared to be effective. On an overall basis, I am pleased to see that NASD has proposed modifications to the by-laws and that the Commission has approved them.

I believe, however, that the modifications have not gone far enough to ensure that the nomination and election processes are fair, represent the desires of the NASD members eligible to vote, and necessarily serve the interests of the public at large. Had the drafters of the modifications at NASD asked the membership or the general public for comments regarding the specific bylaws, I would have made the comments that I offer below at that time. As Commission Release 34-52176 indicates, "written comments were neither solicited nor received" by NASD before it promulgated the modifications to the by-laws. I believe that NASD clearly should have circulated for comment before it was finalized a matter that affects the election of District Committee members, who, among other duties, serve as panelists in disciplinary hearings and consider and recommend policies and rule changes to NASD's Board of Governors.

Accordingly, in spite of the fact that the Commission has already declared the by-law modifications effective, I am offering my comments to the Commission and to NASD so that they both might consider whether any further modifications are necessary or appropriate. Clearly, the by-laws are a living document that can be constantly improved.

### **Modification of Eligibility Criteria**

NASD has changed the eligibility criteria by substituting the term "registered with" instead of "employed by" as it refers to individuals associated with members. This change is particularly welcome because there are thousands of industry professionals who technically are not employees of NASD members using the Internal Revenue Service's understanding of the term yet are associated persons of NASD

members nonetheless. Still, the modifications made to by-law Sections 8.2 and 8.9 conflict slightly with by-law Section 8.20 in the way that that section was modified. By-law Section 8.20 seemingly allows for the eligibility of not only a registered individual but also an individual who though not registered is an officer or director of an NASD member. Indeed, it is possible for an individual to permissibly not be registered as a director or an officer, such as a person who trades commodity futures contracts who is not actively engaged in the securities or investment banking business of the member. By-law Section 8.20 should be further modified to eliminate from possible candidacy a person who is not registered since registration is only permitted for persons that are actively engaged in the securities or investment banking business. Clearly, it is only registered people that should be representing the members regarding district matters involving the securities or investment banking business.

### **Nomination of an Alternate Candidate**

The by-laws have been modified to permit the nomination of one alternate candidate for each district so that in the event that a regular nominated candidate cannot serve, an alternate can be substituted for such regular candidate. This is a very practical solution to a situation that arose in the 2004 District Committee election for District 10, where a candidate that had been nominated withdrew from consideration and another candidate had been nominated by obtaining petitions supporting his candidacy signed by over 10% of the members of the district eligible to vote.

One issue that I have with the modification is that it does not take into account the fact that it is quite possible for more than one candidate to withdraw from candidacy. Accordingly, I recommend that the by-laws be further modified to permit each District Nominating Committee to nominate more than one alternate candidate. Perhaps, there should a limit on the number of alternate candidates to say 50 or 75% of the number of regular candidates nominated. Should the by-laws change to allow for more alternate candidates, I recommend that they be identified sequentially so that the District Nominating Committee would not need to choose which of the alternate candidates would be substituted for a withdrawn candidate.

I am particularly delighted to see in the explanatory remarks included in the SEC Release, that the substitution of an alternate candidate for a regular candidate whose candidacy had been withdrawn would only apply in the event of a so-called uncontested election, where no additional candidate obtains the necessary petitions to qualify to have his or her name added to the ballot. This seems to take into account what happened during the 2004 District Committee election for District 10, where a candidate withdrew prior to the distribution of the contested election ballot.

The real issue in this regard is that while the candidate's withdrawal occurred before the contested election ballot was distributed, I believe it occurred after an additional candidate had already presented NASD with the requisite number of petitions for candidacy. It seems abundantly clear to me that the will of at least 10% of the members had been made clear at that point, and that the District Nominating Committee should not have been permitted in that case to substitute an alternate candidate in lieu of the withdrawn candidate. As it happens, the additional candidate in the District 10 election was elected anyway.

I believe that the by-laws should clearly state that an alternate candidate may only be nominated to the District Committee in the event that there is an open slot on the slate of District Committee nominees that would not otherwise be filled by an additional candidate who has already qualified to be on the slate through the petition mechanism. In short, the additional candidates that have obtained the requisite number of petitions should be given precedence over any alternate candidate.

### **Other necessary modifications**

Lastly, should the by-laws relating to Article VIII be modified in the future, they should take into account certain clauses that are particularly unfair or anachronistic. Current by-law Section 8.21(a) states that “The Secretary of NASD Regulation shall provide a list of all NASD members eligible to vote in the district, ***their mailing addresses*** (emphasis added), and their Executive Representatives to the additional candidate promptly following receipt of the additional candidate's timely notice by the District Director.” NASD has interpreted mailing addresses in a very narrow sense as being defined by the street address where each member has its main office. Strangely, in February 2004, NASD amended Section 8.24 to recognize that it is far easier to distribute materials on behalf of candidates by electronic transmission than by preparing paper mail that needs to be sent through the post office. In District 10, in particular, distributing petitions to Executive Representatives of over 1,500 members is quite costly and unfair when under the current by-laws such distributions cannot be done via electronic transmission, the method of choice used by NASD for many of its functions. Effectively, the current by-laws prevent or discourage additional candidates from coming forward.

In addition, the form of the ballot, as apparently construed by NASD, is unfair. By-law Section 8.25 provides that the names of candidates nominated by the District Nominating Committee be listed separately from the names of additional candidates nominated via the petition process. Unfortunately, this places the additional candidates at a distinct disadvantage since the appearance of the names of additional candidates at the bottom of the ballot, in a separate section, makes them seem to some voters as if they were gadflies from some outlying fringe movement. I can see no purpose to listing candidates in separate sections on a ballot. Rather, the names of all candidates should be listed alphabetically by surname. On the other hand, should the promulgators of the by-laws believe that there is merit to distinguishing candidates nominated by the District Nominating Committee from those that garnered the support of at least 10% of the members eligible to vote, then perhaps a tiny asterisk next to the names of either the nominated candidates or the additional candidates should be enough to provide that information.

### **Full Disclosure**

Lest I be accused of not disclosing my interest in district election procedures, please be informed that I submitted my name to the District Nominating Committee for three years in a row. In each of those years, the committee nominated other candidates. In each of those years, I obtained the requisite number of petitions and my name was placed on the ballot. You might say, I have some intimate

knowledge of how the by-laws were applied in the past.

Likewise I know how they should have been applied. I have confidence that there are some good people at NASD who would be delighted to consider what I have suggested in this letter.

### **Conclusion**

The by-law amendments are improvements over the previous versions that they modified. Certainly, the Commission should not abrogate them since they are a step in the right direction. On the other hand, the other sections of the by-laws of Article VIII should be revisited to ensure that the composition of District Committees is determined in as fair a manner as possible. That's certainly in the interest of the membership, the general public and NASD itself. I appreciate this opportunity to make my views known.

Should the Commission or NASD or their respective staffs wish to discuss this matter with me, I would be delighted to oblige.

Very truly yours,

A handwritten signature in black ink, appearing to read "Howard Spindel". The signature is fluid and cursive, with a large initial "H" and "S".

Howard Spindel  
Senior Managing Director

HS:ab

cc: Kosha Dalal, Esq, Associate General Counsel - NASD

SEC NASD bylaw modifications comment letter 01.DOC