

Special NASD Notice to Members 98-64

Mail Vote—NASD Solicits
Member Vote On
Amendments To NASD By-
Laws To Reconfigure NASD
Board; **Revised Last Voting
Date: September 14, 1998**

Suggested Routing

- ☒ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ☐ Corporate Finance
- ☐ Executive Representatives
- ☐ Government Securities
- ☐ Institutional
- ☐ Insurance
- ☐ Internal Audit
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- ☐ Municipal
- ☐ Mutual Fund
- ☐ Operations
- ☐ Options
- ☐ Registered Representatives
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- ☐ Research
- ☐ Syndicate
- ☐ Systems
- ☐ Trading
- ☐ Training
- ☐ Variable Contracts

Executive Summary

The National Association of Securities Dealers, Inc. (NASD® or Association) invites members to vote to approve the following amendments to the NASD By-Laws: reserve one NASD Board of Governors (Board) position for a person representing an NASD member firm having not more than 150 registered persons; reserve two Board positions for the Chief Executive Officer and one Floor Governor of New Amex LLC (the operating successor organization to the American Stock Exchange [Amex]); and other clarifying amendments. The last voting date is September 14, 1998. The text of the proposed amendments follows this *Notice*.

Questions concerning this *Notice* may be directed to T. Grant Callery, Senior Vice President and General Counsel, Office of General Counsel, NASD, at (202) 728-8285.

Background

The proposed amendments have two purposes. The first purpose is the reservation of a seat on the Board for a person representing a member firm having not more than 150 registered persons. In November 1997, the membership approved a substantial revision to the NASD By-Laws, which was part of a comprehensive revision of the Association's corporate structure. Those revisions were intended to streamline the decision-making process; to improve communication among Board members and the staff; and to enable the Association to act quickly and decisively when appropriate. While the restructuring has been effective in meeting these goals, there is still a need to provide NASD's smaller members (*i.e.*, firms with 150 or fewer registered persons) a more effective voice in matters affecting their business and their customers. To achieve this, the Board approved

the establishment of the Small Firm Advisory Board earlier this year. This Advisory Board acts to ensure that issues of particular interest and concern to smaller member firms, and the potential impact on smaller firms of regulatory and market structure initiatives, will be effectively communicated to and considered by the Board of Governors. To improve further the participation of smaller member firms in the governance of the NASD, the Board has approved a proposal to reserve a position on the Board for a person representing a firm with not more than 150 registered persons.

Another purpose of the amendments is to add the Chief Executive Officer and one Floor Governor of New Amex LLC to the Board, as required by the Transaction Agreement that will bring the Amex into the NASD family of companies. That agreement was approved by the Amex seatholders on June 25, 1998, and it is now necessary for the membership to approve the By-Law changes required for the implementation of the agreement.

The proposed By-Law changes are briefly described below, and the text of the proposed changes is attached as Exhibit A. In Exhibit A, proposed new language is underlined; proposed deletions are in brackets.

Amendments To The NASD By-Laws Article I. Definitions

New definitions have been added, and the terms Industry and Non-Industry "Director" "Governor" and "committee member" have been amended, to incorporate the inclusion of New Amex LLC within the family of companies.

**Article VII. Board of Governors
Composition and Qualifications of
the Board**

This section has been amended to provide that the NASD Board include the Chief Executive Officer and one Floor Governor of New Amex LLC and a representative of an NASD member firm having not more than 150 registered persons, and, in order to ensure some flexibility and maintenance of a majority Non-Industry Board, the maximum size of the Board has been increased to 35 Governors.

Term of Office of Governors

This section has been amended to provide term lengths for the New Amex Chief Executive Officer and Floor Governor, consistent with the Transaction Agreement and the Constitution of New Amex LLC.

Disqualification

A clarifying amendment has been made to this section to provide for the inclusion of the New Amex Chief Executive Officer and one Floor Governor on the Board.

**Article IX. Committees
Executive Committee**

This section has been amended to include a Governor of New Amex LLC on the Executive Committee.

**Article XV. Limitation of Powers
Conflicts of Interest**

This section has been amended to incorporate the inclusion of the Chief Executive Officer and one Floor Governor of New Amex LLC.

Proposed Changes to NASD By-Laws

(Note: New language is underlined; deletions are bracketed.)

Article I

Definitions

(n) "Industry Director" means a Director of the NASD Regulation Board or Nasdaq Board (excluding the Presidents) who: (1) is or has served in the prior three years as an officer, director, or employee of a broker or dealer, excluding an outside director or a director not engaged in the day-to-day management of a broker or dealer; (2) is an officer, director (excluding an outside director), or employee of an entity that owns more than ten percent of the equity of a broker or dealer, and the broker or dealer accounts for more than five percent of the gross revenues received by the consolidated entity; (3) owns more than five percent of the equity securities of any broker or dealer, whose investments in brokers or dealers exceed ten percent of his or her net worth, or whose ownership interest otherwise permits him or her to be engaged in the day-to-day management of a broker or dealer; (4) provides professional services to brokers or dealers, and such services constitute 20 percent or more of the professional revenues received by the Director or 20 percent or more of the gross revenues received by the Director's firm or partnership; (5) provides professional services to a director, officer, or employee of a broker, dealer, or corporation that owns 50 percent or more of the voting stock of a broker or dealer, and such services relate to the director's, officer's, or employee's professional capacity and constitute 20 percent or more of the professional revenues received by the Director or 20 percent or more of the gross revenues received by the Director's firm or partnership; or (6) has a consulting or employment relationship with or provides professional services to the NASD, NASD Regulation, [or] Nasdaq, or New Amex (and any predecessor), or has had any such relationship or provided any such services at any time within the prior three years;

(o) "Industry Governor" or "Industry committee member" means a Governor (excluding the Chief Executive Officer and Chief Operating Officer of the NASD, [and] the Presidents of NASD Regulation and Nasdaq, and the Chief Executive Officer of New Amex) or committee member who: (1) is or has served in the prior three years as an officer, director, or employee of a broker or dealer, excluding an outside director or a director not engaged in the day-to-day management of a broker or dealer; (2) is an officer, director (excluding an outside director), or employee of an entity that owns more than ten percent of the equity of a broker or dealer, and the broker or dealer accounts for more than five percent of the gross revenues received by the consolidated entity; (3) owns more than five percent of the equity securities of any broker or dealer, whose investments in brokers or dealers exceed ten percent of his or her net worth, or whose ownership interest otherwise permits him or her to be engaged in the day-to-day management of a broker or dealer; (4) provides professional services to brokers or dealers, and such services constitute 20 percent or more of the professional revenues received by the Governor or committee member or 20 percent or more of the gross revenues received by the Governor's or committee member's firm or partnership; (5) provides professional services to a director, officer, or employee of a broker, dealer, or corporation that owns 50 percent or more of the voting stock of a broker or dealer, and such services relate to the director's, officer's, or employee's professional capacity and constitute 20 percent or more of the professional revenues received by the Governor or committee member or 20 percent or more of the gross revenues received by the Governor's or committee member's firm or partnership; [or] (6) is a Floor Governor; or [(6)] (7) has a consulting or employment relationship with or provides professional services to the NASD, NASD Regulation, [or] Nasdaq, or New Amex (and any predecessor), or has had any such relationship or provided any such services at any time within the prior three years;

(cc) "Non-Industry Director" means a Director of the NASD Regulation Board or Nasdaq Board (excluding the Presidents of NASD Regulation and Nasdaq) who is: (1) a Public Director; (2) an officer or employee of an issuer of securities listed on Nasdaq or New Amex, or traded in the over-the-counter market; or (3) any other individual who would not be an Industry Director;

(dd) "Non-Industry Governor" or "Non-Industry committee member" means a Governor (excluding the Chief Executive Officer and Chief Operating Officer of the NASD, [and] the Presidents of NASD Regulation and Nasdaq, and any Floor Governor and the Chief Executive Officer of New Amex) or committee member who is: (1) a Public Governor or

committee member; (2) an officer or employee of an issuer of securities listed on Nasdaq or New Amex, or traded in the over-the-counter market; or (3) any other individual who would not be an Industry Governor or committee member;

(jj) "Floor Governor" or "New Amex Floor Governor" means a Floor Governor of New Amex elected pursuant to Article II, Section .01(a) of the New Amex By-Laws;

(kk) "Holdco" means NASD Market Holding Company;

(ll) "New Amex" means New Amex LLC;

(mm) "New Amex Board" means the Board of Governors of New Amex;

Article VII

Board of Governors

Composition and Qualifications of the Board

Sec. 4. (a) The Board shall consist of the Chief Executive Officer and the Chief Operating Officer of the NASD, the Presidents of NASD Regulation and Nasdaq, the Chair of the National Adjudicatory Council, the Chief Executive Officer of New Amex, and one Floor Governor, and no fewer than 16 and no more than [22] 28 Governors elected by the members of the NASD. The Governors elected by the members of the NASD shall include a representative of an issuer of investment company shares or an affiliate of such an issuer, a representative of an insurance company, [and] a representative of a Nasdaq issuer, and a representative of an NASD member firm having not more than 150 registered persons. A majority of the Governors shall be Non-Industry Governors. If the Board consists of [21 to] 23 Governors, at least five shall be Public Governors. If the Board consists of 24 to 27 Governors, at least six shall be Public Governors. If the Board consists of 28 to 31 Governors, at least seven shall be Public Governors. If the Board consists of 32 to 35 Governors, at least eight shall be Public Governors.

Term of Office of Governors

Sec. 5. (a) The Chief Executive Officer and the Chief Operating Officer of the NASD, [and] the Presidents of NASD Regulation and Nasdaq, and the Chief Executive Officer of New Amex shall serve as Governors until a successor is elected, or until death, resignation, or removal.

(b) The Chair of the National Adjudicatory Council shall serve as a Governor for a term of one year, or until a successor is duly elected and qualified, or until death, resignation, disqualification, or removal. A Chair of the National Adjudicatory Council may not serve more than two consecutive one-year terms as a Governor, unless a Chair of the National Adjudicatory Council is appointed to fill a term of less than one year for such office. In such case, the Chair of the National Adjudicatory Council may serve that initial term as a Governor and up to two consecutive one-year terms as a Governor following the expiration of such initial term. After serving as a Chair of the National Adjudicatory Council, an individual may serve as a Governor elected by the members of the NASD.

(c) The New Amex Floor Governor shall serve as a Governor for a term of two years, or until a successor is duly elected and qualified, or until death, resignation, disqualification, or removal. A New Amex Floor Governor may not serve more than three consecutive two-year terms as a Governor, unless such New Amex Floor Governor is appointed to fill a term of less than one year for such office. In such case, the New Amex Floor Governor may serve that initial term as a Governor and up to three consecutive two-year terms as a Governor following the expiration of the initial term.

(d) The Governors elected by the members of the NASD shall be divided into three classes and hold office for a term of no more than three years, such term to be fixed by the Board at the time of the nomination or certification of such Governor, or until a successor is duly elected and qualified, or until death, resignation, disqualification, or removal. A Governor elected by the members of the NASD may not serve more than two consecutive terms. If a Governor is elected by the Board to fill a term of less than one year, the Governor may serve up to two consecutive terms following the expiration of the Governor's initial term. The term of office of Governors of the first class shall expire at the January 1999 Board meeting, of the second class one year thereafter, and of the third class two years thereafter. At each annual election, commencing January 1999, Governors shall be elected for a term of three years to replace those whose terms expire.

Disqualification

Sec. 6. Notwithstanding Section 5, the term of office of a Governor shall terminate immediately upon a determination by the Board, by a majority vote of the remaining Governors, that: (a) the Governor no longer satisfies the classification [(Industry, Non-Industry, or Public Governor)] for which the Governor was elected; and (b) the Governor's continued service as such would violate the compositional requirements of the Board set forth in Section 4. If the term of office of a Governor terminates under this Section, and the remaining term of office of such Governor at the time of termination is not more than six months, during the period of vacancy the Board shall not be deemed to be in violation of Section 4 by virtue of such vacancy.

Article IX

Committees

Executive Committee

Sec. 4. (b) The Executive Committee shall consist of no fewer than [five] six and no more than nine Governors. The Executive Committee shall include the Chief Executive Officer of the NASD, at least one Director of NASD Regulation, at least one Director of Nasdaq, at least one Governor of New Amex, and at least two Governors who are not members of either the NASD Regulation Board, the Nasdaq Board, or the New Amex Board. The number of Directors of the NASD Regulation Board and the number of Directors of the Nasdaq Board serving on the Executive Committee shall be equal at all times. The Executive Committee shall have a percentage of Non-Industry committee members at least as great as the percentage of Non-Industry Governors on the whole Board and a percentage of Public committee members at least as great as the percentage of Public Governors on the whole Board.

Article XV

Limitation of Powers

Conflicts of Interest

Sec. 4. (a) A Governor or a member of a committee shall not directly or indirectly participate in any adjudication of the interests of any party if such Governor or committee member has a conflict of interest or bias, or if circumstances otherwise exist where his or her fairness might reasonably be questioned. In any such case, the Governor or committee member shall recuse himself or herself or shall be disqualified in accordance with the Rules of the Association.

(b) No contract or transaction between the NASD and one or more of its Governors or officers, or between the NASD and any other corporation, partnership, association, or other organization in which one or more of its Governors or officers are directors or officers, or have a financial interest, shall be void or voidable solely for this reason if: (i) the material facts pertaining to such Governor's or officer's relationship or interest and the contract or transaction are disclosed or are known to the Board or the committee, and the Board or committee in good faith authorizes the contract or transaction by the affirmative vote of a majority of the disinterested Governors; or (ii) the material facts are disclosed or become known to the Board or committee after the contract or transaction is entered into, and the Board or committee in good faith ratifies the contract or transaction by the affirmative vote of a majority of the disinterested Governors. Only disinterested Governors may be counted in determining the presence of a quorum at the portion of a meeting of the Board or of a committee that authorizes the contract or transaction. This subsection shall not apply to any contract or transaction between the NASD and: NASD Regulation, Holdco, Nasdaq, or New Amex.

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