

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

Redacted Decision

In the Matter of

X

as a

General Securities Representative

with

The Sponsoring Firm

Notice Pursuant to
Rule 19h-1
Securities Exchange Act
of 1934

Decision No. SD04008

Date: 2004

On August 7, 2003, the Sponsoring Firm¹ ("the Firm") completed a Membership Continuance Application ("MC-400" or "the Application") seeking to permit X, a person subject to a statutory disqualification, to associate with the Sponsoring Firm as a general securities representative. In November 2003, a subcommittee ("Hearing Panel") of NASD's Statutory Disqualification Committee held a hearing on the matter. X appeared, accompanied by his counsel, and by the Proposed Supervisor. X was also accompanied by the Senior Vice President for the Sponsoring Firm, and the Chair of the Sponsoring Firm's Board. LL appeared on behalf of NASD's Department of Member Regulation ("Member Regulation").

A. X's Statutorily Disqualifying Event

X is subject to a statutory disqualification because in March 2002, he pleaded guilty to two counts of driving under the influence of alcohol causing manslaughter and two counts of driving under the influence of alcohol causing bodily injury, both felonies in State 1. The judge permanently revoked X's driver's license and sentenced him to 365 days' imprisonment; a three-year term of "twice a week" reporting probation to commence in September 2003, and end in September 2006; and an additional 10-year term of "once a week" reporting probation to begin at the conclusion of the three year, twice a week reporting probation. Further, for the next 12 years, X is required to travel from his home in State 2 to State 1 every year on or near the anniversary date of the traffic accident to serve a 24-hour jail term. This 24-hour, once-yearly incarceration term began in August 2003, and will end in August 2015. Moreover, X is required to pay \$1,000 per year for 12 years to a charitable fund, in memory of each of the two accident victims. X is also required to complete a substance abuse course and undergo a psychological evaluation for purposes of diagnosis and recommended treatment.

¹ The names of the Statutorily Disqualified individual, the Sponsoring Firm, the Proposed Supervisor, and other information deemed reasonably necessary to maintain confidentiality have been redacted.

B. Background Information

1. X

X was first registered in the securities industry in April 1999 as a general securities representative (Series 7). He also qualified as a uniform securities agent (Series 63) in April 1999 and a uniform combined state law representative (Series 66) in June 2001. Prior to his conviction, X was employed with the Sponsoring Firm as a general securities representative from March 1999 until March 2002. He has no disciplinary history.

2. The Firm

The Sponsoring Firm is based in State 2 and has been a member of NASD since 1987. The Firm has 11 offices of supervisory jurisdiction ("OSJs") and 20 branch offices. In addition, the Firm employs 19 registered principals, 72 registered representatives, and 16 employees. The Sponsoring Firm is engaged in a general securities business.

The Firm does not employ any statutorily disqualified individuals, and it is not a member of any other self-regulatory organization ("SRO").

The Sponsoring Firm is examined on a biannual schedule. The 2003 routine examination resulted in a compliance conference, which raised certain issues including incomplete written supervisory procedures and lack of compliance with anti-money laundering rules.

The 2001 Routine Examination resulted in the issuance of a Letter of Caution ("LOC") and a Compliance Conference. The LOC noted continuing education requirement violations, a failure to report a customer complaint, and an inaccurate computation of net capital. The Firm responded in a letter dated August 2001, stating that the deficiencies had been addressed. At the Compliance Conference, all of the matters noted in the LOC were discussed.

The 1999 Routine Examination resulted in an LOC for a failure to report a customer complaint, an inaccurate net capital computation, inadequate written supervisory procedures, and continuing education requirement violations. The Firm responded to the LOC in a letter dated December 1999, stating that it would take corrective action to address each item.

The 1997 Routine Examination also resulted in an LOC for inadequate fidelity bond coverage, a failure to properly register a person functioning as a principal, restriction agreement violations, and a failure to prepare monthly net capital computations. The Firm responded in a letter dated January 1998, stating that the deficiencies had been addressed.

The record shows no other regulatory or disciplinary actions against the Sponsoring Firm.

C. X's Proposed Business Activities and Supervision

The Sponsoring Firm proposes to employ X as a general securities representative in the Firm's branch office in State 2.

The Firm also proposes that the Proposed Supervisor will be X's primary, responsible supervisor. The Proposed Supervisor is a registered principal and he has been employed with the Sponsoring Firm since September 1991. He has been registered as a general securities representative (Series 7) since November 2001 and as a general securities principal (Series 24) since February 2002. He has been in the securities industry since 1976 as an investment company products/variable contracts representative and direct participation programs representative (Series 1), and he does not have any informal or formal disciplinary history.

D. Member Regulation Recommendation

Member Regulation recommends that the Application be denied because the felony conviction was serious and recent, having occurred only one year ago. Member Regulation does not believe that sufficient time has elapsed for X to have demonstrated his willingness or ability to operate responsibly in the investment industry. Member Regulation also is concerned that X remains subject to probation for the next 13 years, and to 24-hour incarceration periods on an annual basis for the next 12 years.

In addition, Member Regulation states that although the Firm has no formal disciplinary history, Member Regulation is concerned with the number of violations cited in the Firm's past four Routine Examinations. Moreover, Member Regulation notes that the Proposed Supervisor, while not having any disciplinary history, has only limited experience as a general securities principal, having just qualified in February 2002.

E. Discussion

After carefully reviewing the entire record in this matter, we approve the Sponsoring Firm's Application to employ X as a general securities representative, subject to the supervisory terms and conditions set forth below.

In reviewing this type of application, we have considered whether the particular felony at issue, examined in light of the circumstances related to the felony, and other relevant facts and circumstances, creates an unreasonable risk of harm to the market or investors.² We assess the totality of the circumstances in reaching a judgment about X's future ability to deal with the public in a manner that comports with NASD's requirements for high standards of commercial honor and just and equitable principles of trade in the conduct of his business. Our assessment

² See Frank Kufrovich, Exchange Act Rel. No. 45437, 2002 SEC LEXIS 357, at *16 (Feb. 13, 2002) (upholding NASD's denial of a statutory disqualification applicant who had committed non-securities related felonies "based upon the totality of the circumstances" and NASD's explanation of the bases for its conclusion that the applicant would present an unreasonable risk of harm to the market or investors).

includes the nature of the Sponsoring Firm's business; its culture and values; its disciplinary history, if any; the experience, qualifications, and disciplinary history of X's proposed supervisor; the likely effectiveness of the proposed supervisory plan; the proposed activities in which X will engage; how serious and recent the conviction is; and whether X's conduct indicates that he may not act in the securities industry with honesty and integrity. For the reasons set forth below, we conclude that X's participation in the securities industry will not present an unreasonable risk of harm to the market or investors.

We acknowledge the seriousness of X's criminal conviction in connection with the tragic accident that resulted in the deaths of two young women. We also recognize that X has been punished by the State 1 legal system, which imprisoned him for one year, subjected him to lengthy probation terms with differing requirements and imposed financial and future incarceration requirements uniquely designed to keep the memory of the deceased victims prominent in his life.

X's DUI offense occurred in August 1998, when he was a senior in college, and it is the only negative mark on an otherwise blemish-free record. X testified at the hearing about the circumstances surrounding the accident (without collaterally attacking his conviction), the impact it has had on his life, and what he has done to fulfill his sentence and meet the conditions of his probation. His lawyer explained the technical aspects of the State 1 statute and the considerations effecting sentencing. We found this information helpful and credible in assessing X's fitness to deal with the investing public in a manner which comports with our rules. We had the opportunity to assess X's demeanor at the hearing, and we find that he is credible and truly remorseful. He has taken responsibility for the accident, served his prison sentence, and committed himself to compliance with all the terms of his long probation. He has the full support of the Sponsoring Firm management and his intended supervisor.

Further, X had no disciplinary history in the three years that he worked for the Sponsoring Firm prior to his conviction. The Firm proposes that he will perform the same services for clients as he did before the conviction, offering financial planning and brokerage advice to people whose employment situation is in transition. X will be working with the same partner as he did prior to the conviction. Together with his partner, X intends to inform each client in person of his conviction and probationary status.

The Proposed Supervisor is a qualified general securities principal who has been employed in the securities business for more than 27 years with no formal or informal regulatory history. We do not share Member Regulation's concern that the Proposed Supervisor may be inexperienced because he has had a Series 24 registration only since February 2002. The Proposed Supervisor testified at the hearing that for the more than 27 years he has been in the securities business he has simultaneously managed his own accounts and supervised other people. He stated that he is proud that neither he nor the people whom he has supervised have received any customer complaints. The Proposed Supervisor stated that he maintains a "no-nonsense" style of management and that he would immediately notify senior management if X failed to follow any of the required heightened supervisory procedures.

Finally, the Sponsoring Firm has been a member of NASD since July 1998. It does have a disciplinary history, but not one that raises substantive concerns about its business activities or its supervisory system. The supervisory deficiencies noted by Member Regulation that resulted in Compliance Conferences in 2003 and 2001 and LOCs in 2001, 1999, and 1997 related to the sufficiency of the Firm's written supervisory procedures and not to actual supervisory failures. The Sponsoring Firm responded in each instance and stated that the noted deficiencies had been resolved.

Given the nature of X's felony offenses and the fact that he has been previously successfully employed in the securities industry, we conclude that the following supervisory conditions agreed to by the Sponsoring Firm will provide the enhanced compliance measures necessary to monitor X's activities:³

1. The Sponsoring Firm will amend its written supervisory procedures to state that the Proposed Supervisor is the primary supervisor responsible for X;
2. X will not maintain discretionary accounts;
3. X will not act in a supervisory capacity;
4. The Proposed Supervisor will supervise X on-site;
5. The Proposed Supervisor will review all of X's new account forms. The Proposed Supervisor will evidence his review by signing his signature to the forms;
6. The Proposed Supervisor will review X's order tickets on a daily basis;
7. The Proposed Supervisor will review X's outgoing and incoming written correspondence at the time they are either sent or received. No correspondence will be sent or received without the Proposed Supervisor's review and approval;
8. All complaints pertaining to X, whether verbal or written, will be immediately referred to the Proposed Supervisor for review, and then to the Compliance Department. The Proposed Supervisor will prepare a memorandum to the file as to what measures he took to investigate the merits of the complaint (e.g., contact with the customer) and the resolution of the matter. Documents pertaining to these complaints should be kept segregated for ease of review;
9. For the duration of X's statutory disqualification, the Sponsoring Firm must obtain prior approval from Member Regulation if it wishes to change X's responsible supervisor from the Proposed Supervisor to another person;

³ These supervisory terms and conditions are special for X and not required of all the Sponsoring Firm registered representatives.

10. The Proposed Supervisor must certify quarterly (March 31st, June 30th, September 30th, and December 31st) to the Sponsoring Firm's Compliance Department that the Proposed Supervisor and X are in compliance with all of the above conditions of heightened supervision to be accorded X.

We conclude that X's employment in the securities industry will not create an unreasonable risk of harm to the market or investors. NASD certifies that: 1) X meets all applicable requirements for the proposed employment; 2) the Sponsoring Firm represents that it is not a member of any other SRO; and 3) X and the Proposed Supervisor have represented that they are not related by blood or marriage.

Accordingly, in conformity with the provisions of SEC Rule 19h-1, the association of X as a general securities representative with the Sponsoring Firm will become effective within 30 days of the Commission's receipt of this notice, unless otherwise notified by the Commission.

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President and
Corporate Secretary