

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

The Association of

David Girton

as a

General Securities Representative

with

Powell Capital Markets, Inc.

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

SD-2183

June 25, 2018

I. Introduction

On December 4, 2017, Powell Capital Markets, Inc. (the “Firm”) filed a Membership Continuance Application (the “Application”) with FINRA’s Department of Registration and Disclosure. The Application seeks to permit David Girton, a person subject to statutory disqualification, to associate with the Firm as a general securities representative. A hearing was not held in this matter; rather, pursuant to FINRA Rule 9523(a), FINRA’s Department of Member Regulation (“Member Regulation”) recommended to the Chairperson of the Statutory Disqualification Committee, acting on behalf of the National Adjudicatory Council, that it approve Girton’s association with the Firm pursuant to the terms and conditions set forth below.

For the reasons explained below, we approve the Application to permit Girton to associate with the Firm as a general securities representative.

II. The Statutorily Disqualifying Event

Girton is statutorily disqualified due to FINRA’s acceptance, on December 5, 2016, of a Letter of Acceptance, Waiver and Consent (“AWC”). The AWC found that Girton willfully failed to disclose on his Uniform Application for Securities Industry Registration or Transfer (“Form U4”) four unsatisfied judgments and two unsatisfied tax liens filed against him totaling

approximately \$131,600.¹ The judgments and liens were filed against Girton from July 2012 through July 2015. Girton disclosed these matters on his Form U4 nine months to more than two-and-a-half years after he was required to do so.² For these disclosure failures, FINRA suspended Girton for four months and fined him \$7,500. Girton has served his suspension and paid the fine in full.

III. Background Information

A. Girton

Girton first registered as an investment company and variable contracts products limited representative in January 1985, as a general securities representative in March 1986, and as a general securities principal in February 2006.³ He also passed the uniform securities agent state law examination in February 1985. Girton has been associated with 16 different member firms during his career.⁴ FINRA's Central Registration Depository ("CRD"®) shows that Girton has

¹ FINRA's By-Laws provide that a person is subject to "disqualification," and thus must seek and obtain FINRA's approval prior to associating with a member firm, if he is disqualified under Section 3(a)(39) of the Securities Exchange Act of 1934 ("Exchange Act"). *See* FINRA By-Laws, Art. III. Exchange Act Section 3(a)(39)(F) provides that a person is subject to statutory disqualification if he has willfully made a false or misleading statement of material fact, or has omitted to state a material fact required to be disclosed, in any application or report filed with a self-regulatory organization.

Question 14.M of Form U4 asks, "Do you have any unsatisfied judgments or liens against you?" Article V, Section 2(c) of FINRA's By-Laws requires that an associated person keep his Form U4 current at all times and to update information on the Form U4 within 30 days. Further, FINRA Rule 1122 states that, "[n]o member or person associated with a member shall file with FINRA information with respect to membership or registration which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or fail to correct such filing after notice thereof."

² Girton satisfied one of the six judgments and liens underlying the AWC (a judgment in the amount of \$2,500). The record shows that in addition to the judgments and tax liens underlying the AWC, Indiana filed two tax liens against Girton in the amounts of \$274 and \$320, in October 2015 and March 2016, respectively. Girton satisfied the \$320 lien, while the \$274 lien remains unsatisfied.

³ The Application proposes that Girton will function solely as a general securities representative at the Firm and not as a general securities principal. The Firm terminated Girton's registration as a general securities principal in June 2018.

⁴ Girton was terminated from a firm in December 2016 because of the suspension arising from the AWC. Another firm terminated Girton as part of a larger firm restructuring process in

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managed a commercial building through an entity called IMS Building Services since January 2017. Girton spends approximately four hours per month on this outside business activity.

CRD also shows that, in August 2015, the Indiana Securities Division brought an action against Girton for failing to disclose information on his Form U4, which involved the same judgements and liens that were addressed by the AWC. Girton settled the matter by consenting to a civil and administrative penalty of \$500. Further, Girton filed for bankruptcy in June 2011 and received a discharge from his debts in April 2012.

The record shows no other disciplinary or regulatory proceedings, complaints, or arbitrations against Girton.

B. The Firm

The Firm has been a FINRA member since June 1991. It has one Office of Supervisory Jurisdiction, which is located in Roseland, New Jersey. Other than Girton, the Firm employs three registered representatives (two of whom are registered principals).

FINRA conducted the Firm's most recent examination in 2016. This examination resulted in a May 2017 Cautionary Action for failing to prepare and maintain accurate books and records relating to the Firm's accrual of expenses and offsetting liabilities and for inaccurately calculating receivables for municipal securities underwriting activities, which caused the Firm to erroneously calculate its net capital.⁵ The Firm responded in writing that it corrected the deficiencies noted.

The record shows no recent regulatory or disciplinary history against the Firm.⁶

IV. Girton's Proposed Business Activities and Supervision

The Firm proposes that Girton will work from his residence located in Noblesville, Indiana. The Firm represents that Girton will perform sales functions and will introduce clients to the Firm. Although the Firm proposes that Girton will act as a registered representative, it maintains that he will not handle customer orders, effect securities transactions, or make

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July 2012, and Girton was discharged from a firm in January 1999 for "failure to comply with [the] firm's requests for documentation and account procedures."

⁵ FINRA stated that it would review the Firm's municipal underwriting activity in connection with a different examination.

⁶ FINRA issued the Firm a Minor Rule Violation in 2006 for failing to timely report municipal trades.

recommendations to customers regarding specific securities.⁷ Girton will work solely with institutional investors, as that term is defined by FINRA Rule 4512(c). Girton's proposed day-to-day activities will consist of reaching out to his existing contacts for the purpose of introducing them to the Firm. He will be compensated on a commission basis.

The Firm proposes that James Verdone ("Verdone") will serve as Girton's primary supervisor. Verdone does not currently supervise any other individuals and works from a non-registered location in New York City. He first registered as a general securities representative in May 1995, as a general securities principal in October 1995, as a registered options principal in November 1996, as a general securities sales supervisor (Series 9) in January 2001, as a general securities sales supervisor (Series 10) in April 2001, and as a municipal securities principal in April 2012. He also passed the uniform securities agent state law examination in May 1995. Verdone has been associated with the Firm since April 2018, and he is currently registered with eight other member firms.⁸ Verdone was previously associated with 11 firms.

CRD lists one customer complaint filed against Verdone. In April 1997, a customer filed an arbitration claim against Verdone and several others alleging unauthorized trading, breach of fiduciary duty, breach of contract, and failure to supervise. The customer alleged \$28,000 in damages. The matter was settled for \$4,999.⁹

If Verdone is unavailable, the Firm designated Howard Spindel ("Spindel") to serve as Girton's alternate supervisor. Spindel currently serves as the Firm's financial and operations principal ("FINOP"), does not currently supervise anyone at the Firm, and works from a non-registered location in New York City. He first registered as a FINOP in March 1980, as a general securities representative in May 1980, as a general securities principal in June 1982, as a registered options principal in March 1997, and as a securities trader representative in March 2000. He also passed the uniform securities agent state law examination in March 1990. Spindel has been with the Firm since February 1992, and he is currently associated with 24 other member firms.¹⁰ Member Regulation represents that Spindel has been previously associated with approximately 121 firms.

CRD shows that in August 2001, a FINRA Hearing Panel found that Spindel violated NASD Rule 2110 for causing his member firm to conduct a securities business while in net capital deficiency. The Hearing Panel fined Spindel \$2,500.

⁷ The Firm characterizes Girton as a "passive registered representative."

⁸ Verdone serves as the chief compliance officer for four of the firms and as the compliance manager for another firm.

⁹ CRD also shows that Verdone was discharged from several firms as part of a reduction in staff or for other non-regulatory reasons.

¹⁰ CRD shows that Spindel also serves as a director and board member for several entities.

CRD also shows that, in March 2015, Spindel disclosed five tax liens, totaling \$87,860, that had been filed by the State of New York and New York City Department of Finance from April 2006 to April 2012. Spindel learned of the liens and of his obligation to disclose those liens when FINRA brought them to his attention in March 2015.

The record shows no other recent disciplinary or regulatory proceedings, complaints, or arbitrations against Spindel.

V. Member Regulation's Recommendation

Member Regulation recommends approving the Firm's request for Girton to associate with the Firm as a general securities representative, subject to the terms and conditions of heightened supervision described below.

VI. Discussion

We have carefully considered the entire record in this matter. Based on this record, and pursuant to the Commission's controlling decisions in this area, we approve the Firm's Application to employ Girton as a general securities representative, subject to the supervisory terms and conditions set forth below.

A. The Legal Standards

We acknowledge that Girton, as a registered representative, was responsible for knowing the rules of the securities industry and for timely updating his Form U4. *See, e.g., Robert E. Kauffman*, 51 S.E.C. 838, 840 (1993) ("Every person submitting registration documents [to FINRA] has the obligation to ensure that the information printed therein is true and accurate."), *aff'd*, 40 F.3d 1240 (3d Cir. 1994) (table). The Commission has emphasized that Form U4 "is critical to the effectiveness of the screening process used to determine who may enter (and remain in) the industry. It ultimately serves as a means of protecting the investing public." *See Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *25-26 (Nov. 9, 2012). A registered representative's financial problems "raise concerns about whether [he] could responsibly manage his own financial affairs, and ultimately cast doubt on his ability to provide trustworthy financial advice and services to investors relying on him to act on their behalf as a securities industry professional." *Id.* at *32.

We also recognize, however, that FINRA weighed the gravity of Girton's failures to disclose when it agreed to the AWC in December 2016. After considering Girton's entire history in the securities industry, FINRA concluded that a four-month suspension and \$7,500 fine were appropriate sanctions for his misconduct. Girton served this suspension and paid the fine in full. In such circumstances, the Commission has instructed FINRA to evaluate a statutory disqualification application pursuant to the standards enunciated in the Commission's decisions in *Paul Edward Van Dusen*, 47 S.E.C. 668 (1981), and *Arthur H. Ross*, 50 S.E.C. 1082 (1992). *See May Capital Group, LLC* (hereinafter "*Rokeach*"), Exchange Act Release No. 53796, 2006 SEC LEXIS 1068, at *21 (May 12, 2006) (holding that FINRA must apply *Van Dusen* standards

to the membership continuance applications of statutorily disqualified individuals whose disqualifications resulted from FINRA enforcement action).

Van Dusen and *Rokeach* provide that in situations where an individual's misconduct has already been addressed by the Commission or FINRA, and sanctions have been imposed for such misconduct, FINRA should not consider the individual's underlying misconduct when it evaluates a statutory disqualification application. The Commission stated that when the period of time specified in the sanction has passed, in the absence of "new information reflecting adversely on [the applicant's] ability to function in his proposed employment in a manner consonant with the public interest," it is inconsistent with the remedial purposes of the Exchange Act and unfair to deny an application for re-entry. *Van Dusen*, 47 S.E.C. at 671.

The Commission also noted in *Van Dusen*, however, that an applicant's re-entry is not "to be granted automatically" after the expiration of a given period. *Id.* Instead, the Commission instructed FINRA to consider other factors, such as: (1) other misconduct in which the applicant may have engaged; (2) the nature and disciplinary history of the prospective employer; and (3) the supervision to be accorded the applicant. *Id.*

B. Application of the *Van Dusen* Standards

After applying the *Van Dusen* standards to this matter, we have determined to approve the Firm's Application to employ Girton.

First, the record does not show any complaints, regulatory actions, or criminal history against Girton since the AWC. Given the expiration of the suspension imposed upon Girton, and the teachings of *Van Dusen*, he is now permitted to seek re-entry to the securities industry.

Second, the Firm does not have any recent formal disciplinary history, represents that it has addressed the issues raised in the May 2017 Cautionary Action, and has in place well-qualified individuals to supervise Girton. Verdone, Girton's primary proposed supervisor, has no disciplinary history (and CRD lists only a single customer complaint filed against him more than 20 years ago). We also agree with Member Regulation's assessment that Spindel is qualified to supervise Girton notwithstanding the 2001 FINRA action and Spindel's additional disclosures on his Form U4 in 2015 concerning tax liens. We find nothing in the record to suggest that the Firm will be unable to provide the stringent supervision necessary for a statutorily disqualified individual such as Girton, particularly given Girton's limited proposed activities at the Firm as described herein.¹¹

¹¹ We also find that under the circumstances, the fact that Girton will be supervised remotely does not serve as a basis to deny the Application. See *The Ass'n of X*, SD10003, slip op. at 8 (FINRA NAC 2010), http://www.finra.org/sites/default/files/NACDecision/p125898_0_0.pdf (redacted decision) ("While we agree that on-site supervision is the ideal standard for most statutorily disqualified individuals, we do not find that it is always necessary."). As stated herein, Girton's duties at the Firm are narrow in scope and he will

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Third, based on the record before us, we find that the Firm's proposed plan of supervision is sufficiently stringent and comprehensive. We are satisfied that the following heightened supervisory procedures will enable the Firm to reasonably monitor Girton's activities on a regular basis:

Girton will be a "passive registered representative" in that he will not effectuate securities transactions, he will not make recommendations to customers, and he will not handle customer orders. In addition, Girton will work solely with institutional investors as that term is defined in FINRA Rule 4512(c). Girton has agreed to the following plan of heightened supervision:

1. Girton will not effectuate securities transactions, will not make recommendations to customers, nor will he handle customer orders;
2. Girton will not maintain discretionary accounts;
3. Girton will not act in a supervisory or principal capacity;
4. Verdone will serve as Girton's primary supervisor, and Spindel will serve as Girton's alternate supervisor when Verdone is unavailable. Should Spindel supervise Girton for any period of time during Verdone's absence, Verdone shall review Spindel's supervision upon his return and include a memorandum to the file evidencing his review. This document will be kept segregated for ease of review during any statutory disqualification ("SD") examination;
5. Account documentation for onboarding used by Girton will be in paper or electronic form, often using the clearing firm's forms, protocol or software, and will be documented to show if it was approved and with the date and signature of Verdone. Verdone will have access to said documentation physically or electronically, and said documentation is to be segregated for ease of review during any SD examination;
6. Girton and Verdone will meet in person, at least on a quarterly basis each year, to discuss Firm business and any issues regarding this plan of supervision, including but not limited to, Girton's performance and his telephone calls and meetings. At least two of such meetings will be held at Girton's non-branch office location in Noblesville, IN, and the remainder will be held at any other mutually convenient

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interact solely with institutional customers. Further, the heightened supervisory plan contains procedures to ensure that he is stringently supervised, including at least four yearly in-person meetings and weekly telephonic meetings with Verdone. We conclude that these factors, along with Girton's general lack of regulatory and disciplinary history and his supervisors' backgrounds, support offsite supervision of Girton.

venue. Verdone will maintain a written or electronic record of these meetings, which will include a description of the purpose and matters discussed. Records of such meetings will be maintained in a segregated file for ease of review during any SD examination;

7. Girton shall input any meetings and telephone calls on an electronic calendar, which is accessible by Verdone and Verdone will review on a daily basis;
8. With respect to the meetings and telephone calls with Firm clients or prospective clients, Girton will disclose to Verdone, on a weekly basis, details related to such meetings and calls that occurred in the previous week, as well as those meetings and calls that are scheduled for the upcoming week. The disclosure must contain the date, time, participants, topics discussed or to be discussed, and the location of all of Girton's meetings. These materials will be maintained and kept segregated for ease of review during any SD examination;
9. All of Girton's outgoing emails will be blind copied to Verdone and reviewed by Verdone within one business day. Verdone will also review all incoming emails directed to Girton in one business day. Verdone will review any other written correspondence directed to, authored by, or sent by Girton within one business day. Verdone will maintain, in a segregated file, a record of any concerns he notes from his review of Girton's communications;
10. For the purposes of client communications, Girton will only be allowed to use an email account that is held at the Firm, with all emails being filtered through the Firm's email system. If Girton receives a business-related email message in another email account outside the Firm, he will immediately deliver that message to the Firm's email account. Girton will also inform the Firm of all outside email accounts that he maintains and will provide to the Firm access to those accounts upon request;
11. Girton will seek prior approval of his outside business activities and must disclose to Verdone, at least on a monthly basis, details related to any investment-related or outside sales activities. The disclosure must contain, but is not limited to, Girton's activity log, phone call log, appointment log and a summary of pending transactions, if any;
12. The Firm will run a background check or similar credit inquiry on Girton on a quarterly basis in order to check for reportable events on Girton's Form U4. These documents will be kept segregated for ease of review during any SD examination;

13. All complaints relating to Girton, whether verbal or written, will be immediately referred to Verdone for review. Verdone will prepare a memorandum to the file as to what measures he took to investigate the merits of the complaints and the resolution of the matters. Documents pertaining to these complaints should be kept segregated for ease of review during any SD examination;
14. Girton will participate in weekly scheduled telephone calls with Verdone to ensure any new events warranting disclosure on Girton's Form U4, such as new liens and arbitration cases, are timely and properly disclosed. Verdone will memorialize notes of those calls. Those notes will be kept segregated for ease of review during any SD examination. During these weekly scheduled telephone calls, Girton and Verdone will discuss the status of all of Girton's Firm relationships, communications with clients, and scheduled meetings as established in paragraph 8, above;
15. Girton will certify in writing to Verdone on a quarterly basis (as of March 31st, June 30th, September 30th, and December 31st) that Girton has read the Firm's current code of conduct and other applicable policies pertaining to Girton's obligations to disclose legal and regulatory matters to the Firm and that Girton fully understands his obligations thereunder. Verdone will maintain copies of Girton's certifications and will keep them segregated for ease of review during any SD examination;
16. Verdone will certify on a quarterly basis (as of March 31st, June 30th, September 30th, and December 31st) that he and Girton have followed and are in compliance with all of the above conditions of heightened supervision. Such certifications will be kept segregated for ease of review during any SD examination; and
17. The Firm must obtain prior approval from Member Regulation if it wishes to change Girton's primary supervisor from Verdone to another person or make any changes to Girton's alternate supervisor or the plan of supervision.

FINRA certifies that: (1) Girton meets all applicable requirements for the proposed employment; (2) the Firm is a member of the Municipal Securities Rulemaking Board; (3) the Firm has represented that Girton is not related to Verdone or Spindel by blood or marriage; and (4) the Firm does not employ any other statutorily disqualified individuals.

VII. Conclusion

Accordingly, we approve the Firm's Application to employ Girton as a general securities representative, subject to the above-mentioned heightened supervisory procedures. In conformity with the provisions of Exchange Act Rule 19h-1, the association of Girton with the Firm will become effective within 30 days of the receipt of this notice by the Commission, unless otherwise notified by the Commission.

On Behalf of the National Adjudicatory Council,

Jennifer Mitchell Piorko
Vice President and Deputy Corporate Secretary