

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of
the Association of
X
as a
General Securities Representative
with
The Sponsoring Firm

REDACTED DECISION

Notice Pursuant to
Section 19(d)
Securities Exchange Act
of 1934

Decision No. SD01016

On November 15, 1999, the Sponsoring Firm¹ (or "the Firm") completed a Membership Continuance Application ("MC-400" or "the Application") to permit X, a person subject to a statutory disqualification, to associate with the Firm as a general securities representative. In May 2001, a subcommittee ("Hearing Panel") of the Statutory Disqualification Committee of NASD Regulation, Inc. ("NASD Regulation") held a hearing on the matter.² X appeared and was accompanied by the Proposed Supervisor. X also presented the telephonic testimony of a psychologist. BA appeared on behalf of the Department of Member Regulation ("Member Regulation").

X's Statutorily Disqualifying Event. X is subject to a statutory disqualification pursuant to Section 3(a)(39)(A) of the Securities Exchange Act of 1934 and Article III, Section 4(a) of the NASD By-Laws, due to an NASD decision barring him from association with any member of the NASD in any capacity. In 1994, the District Business Conduct Committee ("DBCC") filed Complaint No. C11940058 alleging that X had failed to respond to four written NASD requests for information made pursuant to Article IV, Section 5 of the NASD Rules of Fair Practice (now NASD Procedural Rule 8210), refused to answer questions during a meeting with staff, and failed to respond to a request to schedule an additional meeting.³ X did not answer the

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.

² Consideration of this matter was delayed because X's attorney asked for several continuances of the hearing.

³ NASD staff was attempting to investigate an amended Uniform Termination Notice for Securities Industry Registration ("Form U-5") submitted by a former employer of X. The Form

complaint, and in 1995, the DBCC issued a decision holding that X had violated Article III, Section 1 of the Rules of Fair Practice (now NASD Conduct Rule 2110) and Rule 8210. X appealed to the National Business Conduct Committee ("NBCC"), and in March 1996, the NBCC issued a decision affirming the DBCC's findings. The NBCC held that X had defaulted and that in addition, the record supported the findings of violation. The NBCC ordered that X be censured, fined \$20,000, and barred. X appealed to the Securities and Exchange Commission ("SEC"), but the SEC dismissed the appeal after X failed to submit an opening brief. Thus, the bar is final.

X's Background. X first became a general securities representative in 1989, when he passed the Series 7 (general securities representative) examination. He was associated with five brokerage firms between 1989 and 1996, when he was barred.⁴ Since 1996, he has worked assisting consultants in marketing and assisting public companies in establishing meetings with institutional investors.

X disclosed on his Uniform Application for Securities Industry Registration or Transfer ("Form U-4") that he filed for personal bankruptcy in November 1996, and was discharged in January 1997. Apart from the NASD disciplinary action leading to his bar, X has no disciplinary or criminal history.

The Firm. The Sponsoring Firm was admitted to membership in the Association in June 1991. The Firm's main office is an office of supervisory jurisdiction ("OSJ") in State 1, and it has one branch office. The Firm employs four registered persons (three general securities principals and one financial and operations principal). The Firm, which is engaged in the retail brokerage business, clears through Firm 1 and Firm 2.

The Sponsoring Firm does not employ any statutorily disqualified individuals. There is no history of complaints, disciplinary proceedings, or arbitrations against the Firm. The Firm's last examination by NASD Regulation, which was conducted in 1998, was filed without action.

The Firm is not a member of any other self-regulatory organization; and X and the Proposed Supervisor have represented that they are not related by blood or marriage.

X's Proposed Business Activities. The Firm proposes to employ X as a general securities representative in the Firm's main office. He would be compensated on a commission basis. His business activities would involve servicing institutional accounts, such as mutual funds, and he would be precluded from dealing with individual retail customers.

U-5 indicated that that firm was conducting an internal investigation of a customer's allegations that X had stolen a stock certificate.

⁴ X has not taken the Series 7 exam since 1989.

Proposed Supervision of X. The Firm proposes that the Proposed Supervisor, the Firm's managing partner, supervise X. The Proposed Supervisor has been registered as a general securities representative since 1995 and as a general securities principal since 1999. The Proposed Supervisor has no disciplinary history or record of complaints or arbitrations.

The Proposed Supervisor is the only Firm employee who works in the main office in State 1, and X would work in close proximity to the Proposed Supervisor. The Firm and Member Regulation did not negotiate proposed special supervisory requirements for X, but the Proposed Supervisor noted at the hearing that the Firm would comply with any supervisory requirements that the NAC might impose. According to the Application, the Firm would tape-record all of X's conversations with customers.

Member Regulation's Recommendation. Member Regulation recommends that the Application be denied because X is subject to an NASD bar for failing to provide the NASD with requested information and for refusing to cooperate with an NASD investigation. Member Regulation argued that the conduct that resulted in X's disqualification was very serious. Member Regulation noted that X's actions impeded the NASD's regulatory and investigative functions, thereby undermining the NASD's ability to carry out its self-regulatory mandate. Member Regulation also argued that X had exhibited a blatant disregard for his obligation to supply information.

Member Regulation noted that the bar imposed against X by the NASD was unqualified, thus evidencing the intention to preclude X from ever associating in the securities industry again and creating a strong presumption that X would not be permitted to re-enter the securities industry. Member Regulation argued that the Firm had not presented sufficient circumstances to overcome this strong presumption. Member Regulation asserted that the deterrent effect of the bar entered against X would be diluted, to the detriment of the investing public, if he were permitted to re-enter the securities industry.

Discussion. After careful review of the entire record in this matter, we conclude that the Application should be denied based on the nature and gravity of the disqualifying event and the sanction imposed as a result thereof.

At the hearing, X admitted that his misconduct leading to the NASD bar was wrong. He argued, however, that he had acted irrationally during the years 1993 through 1996 because he was debilitated by highly stressful problems, including the foreclosure of the mortgage on his home, a difficult divorce, and child custody disputes, and that he took medication for depression and sleeplessness for several years. X argued that his condition has improved. X also submitted written evidence and testimony from a psychologist who had assessed X's job suitability via an Internet-based test module. X also argued that his misconduct was not harmful to the investing public and that the NAC should demonstrate compassion toward him.⁵

⁵ X also attempted to introduce evidence about the source of the original customer complaint that led to the updated Form U-5 that led to the NASD investigation with which X failed to cooperate. The Hearing Panel rejected X's efforts to present evidence about the

X was barred based on the decision of our predecessor, the NBCC. We have noted, in another statutory disqualification case involving an NASD-imposed bar, that "[b]ars are intended to prohibit completely a person's ability to engage in any future securities business with any member firm, thus precluding re-entry into the securities industry absent extremely unusual circumstances." See SD99023, 2001 NASD Discip. LEXIS ____, *redacted NAC decision available at http://www.nasdr.com/sd_decision99.htm*. Thus, an extremely strong showing would have to be made for us to find that approval of the Application would serve the public interest. Although the Firm's record, the supervisor's record, and X's other disciplinary history do not raise concerns, we do not find that the strong showing necessary for approval has been made here.

As a general proposition, we find that it would disserve the public interest to permit the association of an individual who, like X, is statutorily disqualified based upon an NASD bar imposed in a failure-to-respond case. In order for NASD Regulation to be able to function as a regulator, it must be able to obtain information for investigations. The NASD, which is not a governmental entity, lacks subpoena power, and the NASD's primary means of obtaining information for investigations is to compel the production of information by NASD members and associated persons via Procedural Rule 8210. Cf., e.g., Charles R. Stedman, 51 S.E.C. 1228 (1994). The SEC has noted that "[t]o allow associated persons to 'flout' [Rule 8210] would 'subvert the NASD's ability to carry out its regulatory responsibilities.'" Jonathan Garrett Ornstein, 51 S.E.C. 135 (1992) (quoting Daniel C. Adams, 47 S.E.C. 919, 922 (1983)).

The sanctions imposed for failure to respond to an information request made pursuant to Rule 8210 have included a bar for many years. See NASD Sanction Guidelines at 20 (1993 ed.); NASD Sanction Guidelines at 22 (1996 ed.); NASD Sanction Guidelines at 31 (1998 ed.); NASD Sanction Guidelines at 39 (2001 ed.). Thus, certain industry participants may be motivated to cooperate with investigations simply because failures to cooperate with NASD investigations typically result in a bar. If we were to approve the Application in this case, NASD Regulation's ability to conduct investigations would be impaired.

We find that X's arguments do not in this instance warrant creating an exception to the general rule that a bar is permanent. We note that the NBCC, on reviewing the evidence, determined that X had violated Rule 8210 by providing an inadequate response to a request for written information, by refusing to answer questions during an NASD interview, and by refusing to comply with an NASD request that he appear for a second interview. The NBCC concluded that X should be barred because he "clearly received the requests for information, his failures to respond appear to have been willful, he has offered no reasonable explanation for his actions, and he has impeded the Association's investigation in [the] matter."

customer complaint, although the Hearing Panel permitted X to testify about his state of mind when he failed to cooperate with the NASD investigation.

In sum, we agree with Member Regulation that the bar serves the interests of the investing public. For these reasons, given proper regard for the public interest and the protection of investors, we find that it would not be appropriate to permit X to be associated with the Firm. Accordingly, we deny the Application of the Sponsoring Firm.

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney
Senior Vice President and Corporate Secretary