BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of the Association of X[1] as a General Securities Representative with The Sponsoring Firm	Redacted Decision Notice Pursuant to Section 19(d) Securities Exchange Act of 1934 SD-09007 Date: 2009

I. Introduction

On April 2, 2008, the Sponsoring Firm filed a Membership Continuance Application ("MC-400" or "the Application") with FINRA's Department of Registration and Disclosure, seeking to permit X, a person subject to a statutory disqualification, to associate with the Sponsoring Firm as a general securities representative. In 2008, a subcommittee ("Hearing Panel") of FINRA's Statutory Disqualification Committee held a hearing on the matter. X appeared at the hearing, accompanied by his counsel, Attorney 1, and the proposed supervisor. FINRA Employee 1, FINRA Attorney 1, and FINRA Attorney 2, appeared on behalf of the Department of Member Regulation ("Member Regulation"). Subsequently, the Hearing Panel presided over post-hearing proceedings that included the submission of additional evidence and post-hearing briefs. For the reasons explained below, we deny the Sponsoring Firm's Application.[2]

---

[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] Pursuant to NASD Rule 9524(a)(10), the Hearing Panel submitted its written recommendation to the Statutory Disqualification Committee. In turn, the Statutory Disqualification Committee considered the Hearing Panel's recommendation and presented a written recommendation to the National Adjudicatory Council, in accordance with NASD Rule 9524(b)(1).

Following the consolidation of NASD and the member regulation, enforcement and arbitration functions of NYSE Regulation into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. See *FINRA Regulatory Notice 08-57* (Oct. 2008).

[Footnote continued on next page]

II. The Statutorily Disqualifying Event

X is statutorily disqualified because in 2004, the SEC issued an Order Imposing Remedial Sanctions ("the Bar Order"), which barred X from associating with any broker or dealer subject to a right to reapply after two years, ordered that he cease and desist from committing or causing any violations or future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Exchange Act Rule 10b-5, and ordered that he pay a $110,000 civil money penalty. *See* FINRA By-Laws Art. III, Sec. 4; Section 3(a)(39) of the Exchange Act. In 2005, the SEC denied X's motion for reconsideration, and the Bar Order became effective on that date. X appealed to the United States Court of Appeals for the D.C. Circuit, but he withdrew his appeal in 2005. There is no evidence that X ever sought or obtained a stay of the sanctions imposed by the Commission.

The Bar Order was based on findings that, in 1998, X engaged in a scheme to defraud in the form of adjusted trading. That scheme consisted of: (1) X's member firm at the time, Firm 1, buying $100 million of corporate bonds from a group of accounts at an investment adviser where some of the transactions occurred above the prevailing market price; (2) shortly thereafter, selling the same bonds back to a different group of accounts at the investment adviser at a $1.376 million loss to Firm 1; and (3) selling to accounts at the investment adviser bonds that were marked up sufficiently to reimburse both Firm 1's $1.376 million loss and a $1.156 million loss that Firm 1 head trader had falsely claimed had been incurred on a non-existent hedge position.

III. Background Information

A. X

X first registered in the securities industry as a general securities representative in 1994. After Firm 1 terminated X's association in 1998 (which was prompted by X's statutorily disqualifying misconduct), X associated with the Sponsoring Firm from 1998 until 2005.

X has 14 years of experience selling mortgage-backed securities and asset-backed security pools. X has always worked as an institutional bond salesman, buying and selling bonds to and from institutional accounts, and has never worked as a trader. X is now in the real estate business. There have been no regulatory actions against X since the statutorily disqualifying event. Member Regulation argues, however, that he has engaged in intervening misconduct.

B. The Sponsoring Firm

[cont'd]

Because this matter involves an MC-400 that was filed before December 15, 2008, we apply the procedural rules that were in effect at the time, the NASD Rule 9520 Series.

The Sponsoring Firm became a FINRA member in 1964. The Sponsoring Firm's MC-400 represents that it has 186 offices of supervisory jurisdiction ("OSJ"), 65 branch offices, and 5,115 employees, of whom 947 are registered principals, and 2,637 are registered representatives. The Sponsoring Firm employs at least one other individual subject to a statutory disqualification.

The Sponsoring Firm was the subject of two NYSE Regulation examinations within the two years preceding the filing of this Application. Specifically, in 2006, NYSE Regulation subjected the Sponsoring Firm to a FINOP examination and a sales practice examination. These resulted, respectively, in a Letter of Admonition and an exception report noting lack of complete compliance with NYSE and Exchange Act Rules.

IV. X's Proposed Business Activities and Supervision

A. Proposed Business Activities

The Sponsoring Firm proposes to employ X as a general securities representative in its home office in City 1, State 1. X's title would be senior vice president, taxable fixed income sales. X would handle accounts for institutional clients, but not retail clients (other than personal or family accounts) or discretionary accounts. He would not engage in any proprietary trading. He would have no supervisory duties. The Sponsoring Firm would compensate X on a commission basis. X would be permitted to purchase stock of the Sponsoring Firm's parent company, but would not otherwise be permitted to participate, directly or indirectly, in the ownership of the company.

B. Supervision

The Sponsoring Firm has outlined the following plan of heightened supervision. The Sponsoring Firm proposes that X would be supervised by the Proposed Supervisor, who supervised X when he was previously registered with the Sponsoring Firm. The Proposed Supervisor has been employed in the securities industry since 1986 and has been associated with The Sponsoring Firm in its institutional fixed income division since 1991. The Proposed Supervisor's title is senior vice president and national sales manager, and he is registered as a general securities representative, a general securities principal, a registered options principal, and a general securities sales supervisor. The record shows no complaints, disciplinary proceedings, or arbitrations against the Proposed Supervisor. The Proposed Supervisor is not related by blood or marriage to X.

The Proposed Supervisor directly supervises 33 persons and indirectly supervises 50 persons, including fixed income salespersons and off-site branch managers of institutional fixed income offices. The Proposed Supervisor testified that on a day-to-day basis he "spend[s] a lot of time reviewing . . . trades." The Proposed Supervisor asserted that he has sufficient time to give heightened supervision to X because his department generates only 30 to 40 trades per day. The Sponsoring Firm proposes that X and the Proposed Supervisor would both be present in the same office, Monday through Friday, "except when either is traveling on business." The Proposed Supervisor would not receive an override on X's production.

The Sponsoring Firm represents that "consistent with Firm policy," the Proposed Supervisor would review and approve X's new account agreements, daily transactions with customers, daily cancel and corrects, and all incoming or outgoing hard copy correspondence and e-mails. Further, X would be unable to input or record trades without obtaining the trader's approval, and all trades would be monitored by the Sponsoring Firm's Employee 1, the manager of the institutional taxable trading desk.

In its MC-400, the Sponsoring Firm stated that the supervision would be heightened because the Proposed Supervisor would "monitor X's trades on a weekly basis (for two years)," but at the hearing the Proposed Supervisor acknowledged that FINRA may require that he do so perpetually. In the Proposed Supervisor's view, the supervision would be heightened because "I'm going to be personally responsible for doing it." The Proposed Supervisor explained that he would be seated next to X on the institutional desk and would be able to "hear every conversation that [X] has." The Proposed Supervisor testified that, when he is out of the office, either the Sponsoring Firm's Employee 1 or the Sponsoring Firm's Employee 2, the head of the taxable fixed income group, would be in the office.

V. Member Regulation's Recommendation

Member Regulation recommends that the Sponsoring Firm's Application be denied. It argues that: (1) X has engaged in intervening misconduct since the statutorily disqualifying event; (2) the Sponsoring Firm's representations that X would not supervise other registered representatives and would limit his duties only to those of an institutional sales associate are not credible; and (3) X provided statements that "demonstrate[ ] his continued unwillingness to accept responsibility for his action that led up the SEC bar."

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 deny the Sponsoring Firm's Application to employ X as a general securities representative. As explained below, X's proposed association with the Sponsoring Firm would create an unreasonable risk of harm to investors and the markets because X engaged in intervening misconduct since his statutorily disqualifying event.

A. Legal Standards

In a statutory disqualification application matter, the sponsoring firm must demonstrate that its proposed association with a statutorily disqualified person "is consistent with the public interest and the protection of investors." FINRA By-Laws, Art. III, Sec. 3(d). Where, as here, the Commission has already addressed an individual's statutorily disqualifying misconduct through its administrative process and has chosen to impose certain sanctions for that misconduct, the specific legal framework that governs our analysis is set forth in *Paul Edward Van Dusen*, 47 S.E.C. 668 (1981).

In such cases, FINRA generally should not evaluate a statutory disqualification application based on the individual's underlying misconduct. Instead, when the period of time specified in the Commission's order has passed, it is inconsistent with the remedial purposes of the Exchange Act and unfair to deny an application for re-entry 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." *Id.* at 671; *see also Arthur H. Ross*, 50 S.E.C. 1082, 1084 (1992). An applicant's re-entry is not "automatic," however, after the expiration of the time period specified by the Commission. Instead, *Van Dusen* instructs that we are to consider other factors, such as: (1) the nature and disciplinary history of the prospective employer; (2) the supervision to be accorded the applicant; and (3) intervening misconduct in which the applicant may have engaged. 47 S.E.C. at 671.[3] We now turn to an analysis of those factors.

B. The Nature and Disciplinary History of the Sponsoring Firm

Van Dusen requires that we consider the nature and disciplinary history of the sponsoring firm. Member Regulation asserts that the Sponsoring Firm "does not have a disciplinary history which raises concern." We have reviewed the Sponsoring Firm's disciplinary history and agree with Member Regulation's assessment.

C. The Sponsoring Firm's Proposed Supervisory Structure

Van Dusen also directs that we consider the Sponsoring Firm's proposed supervisory structure. The plan of heightened supervision that the Sponsoring Firm submitted lacks sufficient elements and detail to assure us that the Sponsoring Firm would prevent and detect possible misconduct on the part of X. Were we otherwise inclined to approve this Application, we would have given the Sponsoring Firm an opportunity to submit a revised plan that cures the deficiencies we perceive to exist. As we explain in the next section, however, we find that X engaged in intervening misconduct that, by itself, warrants the denial of this Application.

D. Intervening Misconduct – Violation of the Bar Order

Van Dusen directs that we consider whether the applicant has engaged in any intervening misconduct. Member Regulation argues that X engaged in intervening misconduct since the statutorily disqualifying event by "associating" with a broker-dealer in violation of the Bar Order. X denies that allegation.

---

[3] Moreover, if an applicant engages in additional misconduct that is similar to the misconduct underlying a bar order in which the time prohibiting application has passed, it is appropriate to consider both instances of misconduct as forming a significant pattern that might justify denial of an application. *Morton Kantrowitz*, Exchange Act No. 51238, 2005 SEC LEXIS 423, at *11-12 (Feb. 22, 2005).

We first review the relevant evidence that the parties presented on this issue. We then analyze whether Member Regulation proved that X engaged in any intervening misconduct. As explained below, we find that X associated with two broker-dealers in violation of the Bar Order, and that such intervening misconduct warrants the denial of this Application.[4]

1. Background

a. Firm 2 and Firm 3

When confronted with the possibility that the SEC might bar him from associating with a broker or dealer, X set up two consulting companies allegedly to "stay involved in the financial services business." Specifically, X founded and managed Firm 2 and Firm 3 (together, the "Consultants") and was their 100 percent owner. Firm 2 was "in the business of recruiting and training sales, marketing and operational personnel for stock brokerage and investment banking businesses." Firm 3 was "in the business of providing management consulting and investment advisory services to stock brokerage and investment banking businesses." Claiming to know "a lot of people . . . in the institutional bond business," X explained that he created the Consultants so he could "recruit and recommend [people] for hire" and then "recommend . . . who could cover certain accounts." With the exception of an assistant, the Consultants had no employees besides X. Because X and his consulting companies were essentially one and the same, we deem all activities of the Consultants to be those of X.

b. X Enters into Two Consulting Agreements with Firm 4 and Firm 5

X's Sponsoring Firm office, where he had worked for more than six and one-half years before being statutorily disqualified, was located across the hall from Firms 4 and 5. Firm 4 was a State 1 corporation registered with FINRA as a broker-dealer. Firm 5 was a State 1 limited liability company registered with the Philadelphia Stock Exchange. Both Firms 4 and 5 entities were "registered broker dealer[s], providing stock brokerage, trading and investment banking services." Due to the close proximity of X's and Firms 4 and 5 offices, X had met, and begun to socialize with, Individual 1, who was the majority stockholder of the Firms 4 and 5entities, president of Firm 4, and manager of Firm 5. Around 2004, X and Individual 1 began to discuss doing business together. X was amenable to such discussions because he did "not know[ ] what [he] was going to do after [he] was barred."

---

[4] Member Regulation contends that X engaged in other intervening misconduct by failing to pay the $110,000 civil money penalty imposed in the Bar Order until at least 15 months after such order became effective. X ultimately paid the outstanding penalty, plus interest, in settlement of a 2006 civil action brought by the SEC seeking an order to find that X had willfully failed to comply with the terms of the Bar Order and to compel payment. Because there are other grounds for denying this Application, and out of respect for the Commission's settlement process, we do not reach the question of whether X's failure to pay the SEC fine sooner amounted to intervening misconduct.

In 2004, X, on behalf of Firm 2 and Firm 3, entered into consulting agreements ("Consulting Agreements") with Firms 4 and 5, respectively. Each Consulting Agreement was for a term of five years, with automatically renewable one-year terms thereafter, unless earlier terminated under the termination provisions of the contract.

c. Services Rendered Pursuant to the Consulting Agreements

i. General

The Consulting Agreements outlined the services that X was to provide to Firms 4 and 5. The Consulting Agreement between Firm 2 and Firm 4 stated that X's "services shall include: (1) recruiting, hiring, and pre and post-hiring training of sales, marketing and operational personnel to enable [Firm 4] to establish and operate a fixed income trading department;" and (2) "at the request of [Firm 4], . . . recruitment and training services in other areas of [Firm 4's] business." The Consulting Agreement between Firm 3 and Firm 5 stated that X's "services shall include: (1) providing management consulting services on opportunities to develop and operate a fixed income trading business; (2) providing investment advisory and asset management advice to [Firm 5] for the firm's own account including advice in the areas of fixed income trading business and real estate investment opportunities; and (3) providing other management consulting and investment advisory and asset management advice on other aspects of [Firm 5's] business."[5]

X made various representations concerning the general services that he envisioned would be performed for Firms 4 and 5, and the services that he actually did perform.[6] According to X, Firms 4 and 5, which provided "trading platforms" for equity day traders, sought to add "proprietary fixed income trading" to their business activities and wanted X to "locate talent." X claimed that the primary intention was that he would help Firms 4 and 5 create a new fixed income division. Other statements, however, reflect that the purposes for retaining X were broader; namely, to do indirectly that which he was barred from doing directly. X claimed that consulting on "[b]usiness development was the most important function I had," including "from the equity side, from the bond side, from the investment banking side." X likewise represented that his consulting activities concerned the recruitment and training of salespersons, mergers and acquisitions, strategic alliances, and growth planning. X stated that none of his business development efforts came to fruition.

---

[5] According to X, the "investment advisory" services that were contemplated involved "acting as a finder of business and advisor to Firms 4 and 5 for strategic [management]," not the kinds of activities that are subject to the laws and regulations governing investment advisers. For purposes of this Application, it is unnecessary to make findings concerning what X and Firms 4 and 5 intended when contracting for "investment advisory services."

[6] When discussing the services he rendered, X made no distinctions between the services he provided to Firm 4, a FINRA member firm, and those he provided to Firm 5.

ii. Recruitment Activities

In support of his efforts to create a new fixed income division, X recruited three bond traders who joined Firms 4 and 5. X stated that he was supposed "to hire institutional bond salespeople," but that such efforts "never . . . got off the ground."[7] X also indicated that he and Firms 4 and 5 "collectively . . . created" a "branch manager in the equity business" and "collectively interviewed and . . . hired" an individual for that position.[8]

iii. Internal Management-Related Meetings, Consultations, and Communications

X, whose name was on several of Firm 4's and Firm 5's e-mail group lists including the "all committee members," "executive committee," "sales and business committee," and "U-5" lists, was a recipient of numerous internal Firms 4 and 5 communications. X also attended "many different kinds of meetings" with Firms 4 and 5 officials. He was "part of the management committee" and the "sales and business committee," a consultant to the "Executive Committee," and was "present in management meetings."[9]

The issues that were covered at such meetings involved a variety of management and operational issues. X stated that he had "discussions [with Firms 4 and 5] on a regular basis about issues that . . . related to managing the company," including "the type of business that Firms 4 and 5 was doing" and "ought to be doing," "how [Firms 4 and 5] might be able to do more business," and "moral[e] in the office." At one such meeting, X participated in a discussion concerning the possible acquisition by Firms 4 and 5 of another entity by "advis[ing] . . . on the implications such an acquisition would have on the firm's new fixed income business." As another example, X requested that Firms 4 and 5 provide him with certain financial information because the traders whom X was recruiting needed to know the amount of capital with which they would be able to work.

X was not part of Firm 4's and Firm 5's compliance committee, but he attended compliance meetings. Firm 4's and Firm 5's compliance officer kept X apprised of, and requested his input on, various general compliance matters. For example, after the effective date of the Bar Order, the compliance officer: (1) updated X concerning the development of a new supervisory manual; (2) kept X "in the loop" on compliance "reorganization" efforts; (3) asked X to keep him "informed of all relevant issues and particularly those related to compliance";

---

[7] X also testified that he "helped Individual 1 interview candidates that he was . . . considering hiring for his electronic trading platform." It is unclear if this referred to something other than X's recruitment of the personnel for a new fixed income division.

[8] X indicated that his recruiting activities occurred during 2005.

[9] X admitted that he participated in the sales and business committee meetings, but denied that he was "part" of the sales and business committee.

(4) sought X's input on developing Firm 4's and Firm 5's"business plan" and a corporate organization chart; (5) invited X to meetings to discuss how to respond to a FINRA request for information, which was prompted by the addition to Firm 4's and Firm 5's Form BD of fixed income as a business activity; (6) had a conversation with Individual 1 and X concerning Firm 4's and Firm 5's closing of a "joint back office"; and (7) copied X on an e-mail informing Individual 1 that he needed to qualify as a general securities principal.[10]

iv. Operational Recommendations

The record shows that X made various recommendations concerning Firm 4's and Firm 5's operations. X: (1) discussed with Firms 4 and 5 whether it should "open[ ] more offices"; (2) "recommended that . . . Firms 4 and 5 hire a compliance officer"; (3) recommended that Firms 4 and 5 designate persons who would be responsible for its fixed income business and equity business; (4) recommended that Firms 4 and 5 use Bloomberg terminals as a "front end system"; (5) lobbied senior management of the Firms 4 and 5 entities, at the request of the traders, to increase the traders' position limits[11] and to ensure that Firms 4 and 5 placed the money such traders had earned in segregated accounts[12]; (6) made recommendations concerning the compensation of the persons he recruited to join Firms 4 and 5; (7) asked Individual 1 to "sell his share" in Firms 4 and 5 or "the airplane" to meet certain commitments that Firms 4 and 5 made to the traders and to obtain more trading capital; and (8) gave Individual 1 "a lot of ideas on how to raise money."

v. Interviews with Acquisition Targets

X admitted that he "helped [Individual 1] interview . . . individuals that had businesses" that Firms 4 and 5 was considering buying. X claimed that he was responsible for interviewing potential acquisition candidates, recommending whether Firms 4 and 5 "should bother talking to

---

[10] X maintained that the evidence of his involvement and communications with Firms 4 and 5 shows that he was only a "consultant," because it was "important that I be kept current on matters that could affect the areas in which I was consulting." X asserted that he simply was "asked for input on a number of topics, and provided same." He further noted that the compliance officer's various communications demonstrated that "other individuals . . . were responsible for and handling . . . the day-to-day running and management of Firms 4 and 5."

[11] At the hearing, X summarily denied his earlier on-the-record testimony that he lobbied to change the position limits. We credit, however, X's earlier testimony on the subject, which was extensive as well as closer in time to the relevant events.

[12] X stated that he felt a "responsibility" to the traders he had recruited to try to ensure that Firms 4 and 5 was segregating the money that such traders had earned. X explained that the traders believed that X had "influence" with Individual 1. X clarified, however, that "I . . . never stated that I had any influence over Individual 1" to resolve position limit and compensation issues.

those guys," and opining on whether the salespersons involved in any prospective deal would be "successful." In this regard, X testified that he "interviewed . . . several . . . people that had broker dealers . . . in State 2" with whom Firms 4 and 5 was "pursuing to work together."[13] He added that Firms 4 and 5 "never did anything with" such persons.

vi. Meetings with External Parties

X, on behalf of Firms 4 and 5, also met with other external parties. X attended a meeting with Firm 4's and Firm 5's clearing firm to discuss: (1) the kind of business in which Firm 4's and Firm 5's fixed income group would be engaging, including the sales and purchase of government bonds; (2) the minimum margin requirement and "what the haircut would be"; (3) the "type of net capital that we were going to need"; and (4) "how to integrate . . . the front office with the back office."[14] X explained that the clearing firm's interest in having such a discussion was because of the risk that the clearing firm "can be left with unsecured debit balances." X explained that it was "important for me to explain to [the clearing firm] the type of trading that was anticipated as well as the length and depth of experience of . . . the . . . traders" because "I knew about that more than [Firm 4's and Firm 5's management] did."[15] X also acknowledged that, on the same trip, he attended a meeting with an individual who "did market making for Firms 4 and 5 in City 2."

In addition, X traveled to State 2 in an effort to acquire more capital for Firms 4 and 5 from Individual 1's friends.[16] X went on the trip to explain the anticipated bond business and what such persons' capital would be used for because Individual 1 "didn't know" how to explain it. X stated: "Clearly, since some of the capital that would be contributed [by Individual 1's friends] . . . would be used for fixed income proprietary trading, I was the person to explain the experience of the traders I had recruited . . . ."[17]

---

[13] Notes taken by Firm 4's and Firm 5's compliance officer indicate that Firm 4's and Firm 5's possible acquisition of a broker-dealer was a live issue in2005.

[14] As part of his overall goal of creating a fixed income division, X was tasked with "bring[ing] in a front end system into our office," which could be "mix[ed] . . . with" the clearing firm's back office system.

[15] Also attending that meeting, which was conducted on a plane, was Individual 2, an executive vice president of Hedge Fund 1, a hedge fund that planned to conduct options trading through Firms 4 and 5. X's understanding was that Individual 2 was attending the meeting "because he needed to . . . ensure the clearing firm could handle" the hedge fund's expected trading activities and to "discuss margin requirements."

[16] Notes taken by Firm 4's and Firm 5's compliance officer indicate that X traveled to State 2 in 2005, but did not indicate the specific purpose of that trip.

[17] We find that the meetings discussed in this section occurred after the effective date of the Bar Order. The evidence that supports that finding includes X's statement that his meeting with

[Footnote continued on next page]

vii. Loans to Individual 1

X testified that Individual 1 asked repeatedly that X extend a loan to Firms 4 and 5 "because they didn't have enough money to get any leverage." X claimed that he always rejected Individual 1's requests. Nonetheless, X admitted that he helped Individual 1—who purportedly was "personally in need of immediate cash"—obtain a $200,000 loan from a bank of which X is an equity partner. Moreover, in advance of the closing of that loan, X himself lent Individual 1 $100,000 "because [Individual 1] needed the monies before the closing." X stated that his $100,000 loan was "short term" and "repaid shortly thereafter when Individual 1 closed on his $200,000 bank loan."

viii. Interactions with Firm 4 and Firm 5 Employees, Including Traders, and Customers

X had various interactions with Firms 4 and 5 employees. He requested bond market information from Firms 4 and 5 traders, purportedly because he only "wanted to know what was going on in the market." X further testified, however, that he would ask the traders if they were "long or short" because their profits or losses "would make a difference in the amount of money that I would ultimately make."[18] X testified that he also provided "moral support" to some of the people that traded for Firms 4 and 5 and that used Firm 4's and Firm 5's system. The record does not reflect whether such persons included customers of Firms 4 and 5.

ix. X's Assertions Concerning the Activities in which He Did Not Engage

X claimed that he never got involved in Firm 4's and Firm 5's day-to-day operations and never had direct or indirect involvement with securities transactions. Specifically, he asserted that he never had securities-related conversations with customers, solicited business, introduced any customers to Firms 4 and 5 (with one exception), offered advice on any securities transactions, placed trades, or reviewed any records that reflected trading activities. Likewise, he asserts that although he advised Firms 4 and 5 on expanding its business operations, including potential acquisitions, he did not engage in investment banking activities himself. X also stated that he never engaged in investment advisory activities or provided asset management advice.

Further, X claimed that he did not have the authority to hire, fire, reward, or reprimand employees; bind Firms 4 and 5 or make decisions on its behalf; negotiate or enter into any

---

[cont'd]

the clearing firm happened after he had left the Sponsoring Firm, and his testimony that everybody at all of the meetings "knew about my bar from the industry."

[18] The details of X's compensation are discussed below in Part VI.D.1.g.

agreements or contracts on behalf of Firms 4 and 5; direct or control the trading activities, or other activities, of Firms 4 and 5, its traders, or its employees; direct the management of the firm; supervise any employee; or set salaries, bonuses, or benefits.

d. Terms of X's Engagement with Firm 4 and Firm 5

The Consulting Agreements indicate that X was an "independent contractor." Likewise, X represented that: (1) the Consulting Agreements were executed at arm's length; (2) he neither had, nor exercised, authority over Firms 4 and 5; (3) he did not "maintain[ ] any position or status of authority with or within Firms 4 and 5 (i.e. partner, officer, director, or branch manager)," or hold himself out as such; (4) he consistently held himself out as a "consultant"[19]; (5) whether Firms 4 and 5 adopted his suggestions was "solely within the discretion of Firms 4 and 5"; and (6) he never "controlled" Firms 4 and 5, but was just "asked for input on a number of topics, and provided same."

e. X's Office

X's office—the same space that he had occupied during his tenure with the Sponsoring Firm —was located in a suite that Firms 4 and 5 subleased from the Sponsoring Firm, across the hall from offices that Firms 4 and 5 already occupied. When the three traders whom X recruited joined Firms 4 and 5, they moved into the same office suite in which X was located.

X nevertheless maintained that he "did not share offices with Firms 4 and 5." While allowing that he had to "walk into an area that Firms 4 and 5 . . . subleased" to access his personal office, X stated that he "maintain[ed] a separate suite [from Firms 4 and 5]," "ha[d] independent access to [his] offices that the other party [could] not control," had separate phone lines, maintained his own files, and did not share Firm 4's and Firm 5's computer systems. X also claimed that Firms 4 and 5 "ha[d] their own separate employees." X stated that he "remained in [his] office . . . and kept that office separate and apart from anything that had anything to do with Firms 4 and 5." Nonetheless, X acknowledged that he would "commiserate all day long" with the traders, so much so that he knew about the securities positions that Firms 4 and 5 traders had taken.[20]

---

[19] During an on-the-record interview, X acknowledged that he was introduced to Individual 2, the hedge fund representative, "[a]s a consultant to Firms 4 and 5 but more of a partner in the business." X later clarified that "[i]f the word partner . . . was used, it was not used in its literal sense." X elaborated that it was "very clear to everyone" that he was a consultant, not a partner, officer, director, or employee of Firms 4 and 5, because "[e]verybody knew about . . . my bar from the industry" and because "I told them what my relationship was."

[20] X also claimed that he "paid rent," because part of his compensation from Firms 4 and 5 was supposed to be his "rent." We do not credit those assertions. Nothing in the Consulting Agreements, or any other documentary evidence such as tax forms, corroborates X's claim that Firms 4 and 5 treated the rent for X's office as part of X's compensation.

X had a Bloomberg terminal in his office, which is the same system that, at his suggestion, Firms 4 and 5 obtained for its business. X stated that he used that Bloomberg terminal "as his primary e-mail account" and to check news and stocks. X also admitted that he "may have had access to Firm 4's and Firm 5's trading systems," but that "he never went on."

f. Timing of Provision of Services

The record contains conflicting evidence concerning when X, through the Consultants, began providing services to Firms 4 and 5. We find that the best evidence on this issue is the text of the Consulting Agreements. Both agreements reflect that they were entered into and executed in 2004, and that the Consultants become "obligated" to render services as of that date. Thus, we find that X began providing some services in 2004, which was before the Bar Order took effect in 2005. That said, we find X's claim that he provided all of his services after late 2005 to be a significant admission, to the extent that the record does not otherwise identify the specific timing of X's various activities for Firms 4 and 5.

The record also contains conflicting accounts of when X ceased providing services to Firms 4 and 5. The most persuasive evidence on this issue is X's admission that he ceased providing services in late April 2005. Of the various assertions he made on this subject, this admission went most against his own interest. Moreover, X linked this admission to a specific event: the time when his attorneys made a demand on Firms 4 and 5 for payment of "unpaid consulting fees and un-reimbursed expenses."[21] Accordingly, we find that X provided services to Firms 4 and 5 for approximately two months after the Bar Order became effective.

g. Compensation

The two Consulting Agreements contained similar compensation terms. Firms 4 and 5 agreed to provide the following compensation to X, through the Consultants: (1) a signing bonus ($45,000 to Firm 2; $30,000 to Firm 3); (2) an annual base compensation ($336,000 to Firm 2; $264,000 to Firm 3); (3) an annual "guaranteed bonus" paid at the end of every 12-month period following the effective date of the agreements ($336,000 to Firm 2; $264,000 to Firm 3); (4) a "performance-based bonus pool participation" interest in the "Quarterly Net Profit" of Holding Company 1, a holding company that was in the process of acquiring both Firms 4 and 5, and its subsidiaries (12 percent participation interest to Firm 2; 8 percent to Firm 3); and (5) the option to acquire a specified percentage (12 percent for Firm 2; 8 percent to Firm 3) of the common stock of Holding Company 1, to be granted within five days after Holding Company 1 had "secured all regulatory approvals" to acquire Firms 4 and 5. X claimed that the total compensation amounts were based on his compensation at the Sponsoring Firm (which ranged

[21] In contrast to X's explanation of why the relationship terminated, in 2005 letter from Firm 4's and Firm 5's CEO to NASD staff indicated that Firm 4's and Firm 5's relationship with X was set aside to wait for "a definitive response from the NASD" as to whether it "approved" of the relationship.

between $2.5 and $5 million per year), the amount of business that the persons whom X recruited were expected to do, and the expectation that additional salespersons would be hired at Firms 4 and 5.

X claimed that his compensation was "not contingent on, or related in any way to the sale of securities" or any "commissions realized from trading of Firm 4's and Firm 5's customer accounts." He admitted, however, that portions of his compensation depended on the amount of securities business that Firms 4 and 5 generated. With respect to the "guaranteed bonus," X testified that "[i]f the bond [side] didn't do [$600,000] in business in a year, I couldn't get th[e] bonus." X also testified that the success of three traders he recruited "would make a difference in the amount of money that I would ultimately make." Indeed, both agreements stated that Firms 4 and 5 could terminate the Consulting Agreements upon 30 days' written notice "in the event that revenues of at least $1,200,000 are not generated by or attributable to" X's services, for the first year after the effective date.

Firms 4 and 5 made only certain of the payments that were due under the Consulting Agreements. Various books and records of Firms 4 and 5 and the Consultants show that Firm 4 paid X a total of $3,753.10 in 2005, *prior* to the effective date of the Bar Order, and a total of $84,511 in 2005, *after* the effective date of the Bar Order.[22] X claimed that $75,000 of these payments reflected the payment of bonuses, and that the other payments were either advances against, or reimbursement for, expenses. X stated that he was never paid for his recruitment efforts, and that the "minority interest of stock [in Firm 4's and Firm 5's holding company] never came to pass."

2. X "Associated" with a Broker-Dealer in Violation of the Bar Order

Both the NASD By-Laws and the Exchange Act prohibited X from associating with a broker-dealer in violation of the Bar Order. Article III, Section 3 of the NASD By-Laws provided during the relevant period that "[n]o person shall become associated with a member . . . if such person is or becomes subject to a disqualification." Section 15(b)(6)(B)(i) of the Exchange Act provides that "[i]t shall be unlawful . . . [f]or any person as to whom [a Commission bar order] is in effect, without the consent of the Commission, willfully to become, or to be, associated with a broker or dealer in contravention of such order." Whether X violated such provisions depends, therefore, on whether he "associated" with a broker-dealer after 2005, the day the Bar Order became effective.

There are a myriad of ways in which a person may be "associated" with a broker-dealer. Among them, persons who "conduct[ ] activities or functions that require registration under NASD rules will be considered associated persons of the member, absent the service provider separately being registered as a broker-dealer and such arrangements being contemplated by NASD rules . . ., MSRB rules, or applicable federal securities laws or regulations." *NASD*

---

[22] Such findings belie X's hearing testimony that he only received payments before he became disqualified.

Notice to Members 05-48 (July 2005). As explained below, in working for Firms 4 and 5, X engaged in three kinds of activities that each independently required registration. X, however, was not separately registered as a broker-dealer, and neither NASD rules nor federal securities laws or regulations contemplate the outsourcing of some of the functions in which X engaged. Because X's activities were the activities of an "associated person" of Firms 4 and 5, he violated the Bar Order.

a. Transaction-Related Compensation

First, X was an "associated person" of Firms 4 and 5 because he was contractually entitled to receive transaction-related compensation in connection with his activities for STG, but he was not separately registered as a broker-dealer:

> Absent an exemption, an entity that receives commissions *or other transaction-related compensation in connection with securities-based activities* that fall within the definition of "broker" or "dealer" . . . generally is required to register as a broker-dealer . . . . [This is] because, among other reasons, registration helps to ensure that persons with a "salesman's stake" in a securities transaction operate in a manner consistent with customer protection standards governing broker-dealers and their associated persons, such as sales practice rules. That not only mandates registration of the individual who directly takes a customer's order for a securities transaction, but also . . . any other person in a position to direct or influence the registered representative's securities activities.

1st Global Inc., 2001 SEC No-Act. LEXIS 557, at *5-6 (May 7, 2001) (emphasis added and internal quotation marks omitted); *NASD Notice to Members 05-18* (Mar. 2005) (noting that "[a]mong the activities the SEC staff has found [to] require registration are: receiving transaction-based compensation"); *Persons Deemed Not to be Brokers*, Exchange Act Rel. No. 22172, 1985 SEC LEXIS 1217, at *13 (June 27, 1985) ("[T]he receipt of transaction-based compensation often indicates that [a] person is engaged in the business of effecting transactions in securities.").

Several aspects of X's compensation were directly dependent on securities transactions and, therefore, transaction-related. One provision in the Consulting Agreements provided that Firms 4 and 5 could terminate the agreement "in the event that revenues of at least $1,200,000 are not generated by or attributable to" X's services in the first year. Any such revenues would have been generated by securities transactions, because X's primary task under the Consulting Agreements was to set up a fixed income trading department. Another provision provided that X would receive a "performance-based bonus pool participation" interest in the profits of Firm 4's and Firm 5's holding company, which was attempting to acquire Firms 4 and 5. Indeed, X acknowledged that the traders' success "would make a difference in the amount of money that I would ultimately make."

Because much of the compensation to which X was entitled depended on generating a sufficient volume of securities transactions, X was required to register as a broker-dealer. *Cf. Sec. Mut. Life Ins. Co. of Lincoln, Nebraska*, 1993 SEC No-Act. LEXIS 1082 (Oct. 26, 1993) (stating that payments consisting of "a flat percentage of the net revenues generated by . . . registered representatives" amounted to "compensation directly based on securities transactions"); Section 15(a)(1) of the Exchange Act (providing that "[i]t shall be unlawful for any broker or dealer which is . . . a natural person not associated with a broker or dealer" to act as a broker without registration). Because X was not separately registered as a broker-dealer, X was an associated person of Firms 4 and 5.

b. Acting as a Principal

Second, X was an associated person of Firm 4 because he acted as a principal of Firm 4 and was required to be registered as such.[23] NASD Rule 1021(b) defines a "principal" as persons in certain listed categories[24] who are "actively engaged in the management of the [member firm's] investment banking or securities business, including supervision, solicitation, conduct of business, or the training of associated persons."[25] Persons who do not fall into one of the listed categories in Rule 1021 are nonetheless principals "where . . . the requirement of active engagement in the management of the member's investment banking or securities business is satisfied." *Dennis Todd Lloyd Gordon*, Exchange Act Rel. No. 57655, 2008 SEC LEXIS 819, at *25 n.31 (Apr. 11, 2008).

The record shows that, after the effective date of the Bar Order, X actively engaged in the management of Firm 4's investment banking or securities business. X recruited traders; worked to develop a fixed income trading business; was routinely consulted on managerial issues; participated in corporate meetings; explained the firm's fixed income strategy to third parties, including Firm 4's clearing firm and persons considering providing capital to Firm 4; made operational recommendations, including that Firms 4 and 5 seek to obtain additional capital; and interviewed potential broker-dealers that Firm 4might acquire. Furthermore, X acknowledged that his duties involved training persons that he had recruited, which is one of the functions that is expressly listed in the definition of principal. *See* NASD Rule 1021(b). In addition, X

---

[23] X was not separately registered as a broker-dealer to conduct a principal's functions, and the outsourcing of X's principal's functions is not the kind of arrangement that is contemplated by NASD rules, or federal securities laws or regulations. *See NASD Notice to Members 05-48*.

[24] The five listed categories in NASD Rule 1021(b) are sole proprietor, officer, partner, branch manager of an Office of Supervisory Jurisdiction, and director.

[25] "Investment banking or securities business" means "the business, carried on by a broker [or] dealer . . . of underwriting or distributing issues of securities, or of purchasing securities and offering the same for sale as a dealer, or of purchasing and selling securities upon the order and for the account of others." NASD By-Laws Art. I(u).

maintained a physical presence within Firms 4 and 5 suites, so much so that he knew information about the trading positions Firms 4 and 5 traders maintained.

All of these factors demonstrate that X associated with Firms 4 and 5 as a principal and was required to be registered as such. *See Samuel A. Sardinia*, 46 S.E.C. 337, 343 (1976) (holding that respondent, who provided "accounting and consulting services" and who served as neither an officer nor a director, was a principal where he "spent a substantial amount of time in connection with the affairs of the firm, actively participated in management decisions to an extent clearly exceeding that of a mere accountant, and was compensated accordingly"); *see also Gordon*, 2008 SEC LEXIS 819, at *26, 30 ("We have previously held that a person who devotes significant time to firm affairs and participates in management decisions is a principal, whether or not the person holds an official firm title."); NASD Rule 1021(a) ("All persons engaged or to be engaged in the investment banking or securities business of a member who are to function as principals shall be registered as such with NASD . . . .").[26] The fact that X was regularly consulted on management issues "illustrates his influence in the management of the firm" and supports a finding that he acted as a principal.[27] *See Sardinia*, 46 S.E.C. at 345.

That X alleges he was not involved in the day-to-day management of Firm 4's and Firm 5's business, or directly involved in the "chain of [any] securities transactions," does not prevent a finding that he was a principal. *Gordon*, 2008 SEC LEXIS 819, at *28 (rejecting argument that a person who performed "functions not involved in the chain of the securities transaction" was not required to register as a principal); *Pecaro*, 1998 NASD Discip. LEXIS 5, at *16 n.11 ("[A] showing that the associated person was 'actively engaged in the management of the member's

---

[26] *Cf. Dep't of Enforcement v. Harvest Capital Invs.*, Complaint No. 2005001305701, 2008 FINRA Discip. LEXIS 45, at *27-28 (FINRA NAC Oct. 6, 2008) (finding that person acted as a principal where, among other things, he contacted clearing firms to discuss potential clearing relationships); *Richard F. Kresge*, Exchange Act Rel. No. 55988, 2007 SEC LEXIS 1407, at *49-50 (June 29, 2007) (holding that person was a principal because, among other things, he "often was present" in the broker-dealer's offices, was "actively involved in hiring," and "participated in meetings"); *Dep't of Enforcement v. Beerbaum & Beerbaum*, Complaint No. C01040019, 2006 NASD Discip. LEXIS 5, at *10 (May 19, 2006) (holding that person in charge of training registered representatives required a principal registration), *aff'd*, Exchange Act Rel. No. 55731, 2007 SEC LEXIS 971 (May 9, 2007); *Dist. Bus. Conduct Comm. v. Pecaro*, Complaint No. C8A960029, 1998 NASD Discip. LEXIS 13, at *19-20 (NASD NBCC Jan. 7, 1998) (finding that respondent was required to register as a principal, where he held himself out in "a manner that would lead an objective observer to infer that he was intimately involved" as a principal in the firm's securities business, including his "physical presence" at the broker-dealer's office and his interaction with the firm's principals and traders).

[27] Other facts show X's influence. He facilitated a $200,000 loan to Individual 1, Firm 4's and Firm 5's president and owner, and personally lent him $100,000. Moreover, at X's suggestion, Firms 4 and 5 hired the three traders whom he recruited, acquired Bloomberg terminals, and subleased the Sponsoring Firm office suite.

. . . securities business[,]' . . . does not require a showing that the individual was responsible for the day-to-day management of the member."). Likewise, the fact that X engaged in certain functions that, viewed in isolation, may not have required registration as a principal does not prevent a finding that he was required to register. *Gordon*, 2008 SEC LEXIS 819, at *32 ("[W]e consider all of the relevant facts and circumstances, including the cumulation of individual acts that might not, on their own, show management.").

Accordingly, we find that X was required to register as a principal of Firms 4 and 5 and was, therefore, associated with a broker-dealer in violation of the Bar Order.

c. Intermediary Involved in Mergers and Acquisitions

Third, X was an associated person of Firms 4 and 5 because his work in support of Firm 4's and Firm 5's potential acquisition of another broker-dealer itself required his registration as a broker-dealer, but he was not separately registered as such. SEC staff has cited various factors that would require a financial intermediary who brings parties to an acquisition together to register as a broker-dealer. Such factors include—all of which are present here—when the intermediary makes a recommendation or provides advice to the buyer or seller, "advises its client as to the quality of any offer," or "has previously been involved in the sales of securities" or "disciplined for violations of the securities laws." *Report and Recommendations of the American Bar Association Task Force on Private Placement Broker-Dealers*, 60 Bus. Law. 959 (May 2005) ("The SEC wants to be certain that the finder exception [to broker-dealer registration] is not a 'back door' for past violators barred from the industry to remain involved and put investors at risk"); *see May-Pac*, 1973 SEC No-Act. LEXIS 1117, at *3 (1973) ("Registration and regulation of persons engaged in merger and acquisition activities has often been required in instances where these activities involve transactions in securities."); *Jack Northrup Assocs*., 1972 SEC No-Act. LEXIS 1487, at *1-2 (Feb. 9, 1972) (declining to give no-action relief to "finder for mergers [and] acquisitions" who would sometimes "be involved in the communications between the parties" and would "advise" one of the parties). Because X's mergers and acquisitions work for Firms 4 and 5 required him to register as a broker-dealer, but he had not registered as such, he was an associated person of Firms 4 and 5.

d. Defenses

X argues that associating with a broker-dealer in violation of a bar order is not a violation unless it was "willful," and he asserts that he did not "willfully" associate with a broker-dealer. We reject these arguments.

Article III, Section 3(b) of the NASD By-Laws provided that "[n]o person shall become associated with a member . . . if such person is or becomes subject to a disqualification." This prohibition contained no willfulness requirement. Therefore, irrespective of whether X's conduct was willful, his association with Firm 4 violated the NASD By-Laws.

In contrast, the Exchange Act prohibition against violating a bar order does contain a willfulness requirement, but the record shows that X's conduct was, in fact, willful. "Willfully" signifies that the respondent intended to commit the act that constitutes the violation, not that the

respondent intended to violate securities laws. *John D. Audifferen*, Exchange Act Rel. No. 58230, 2008 SEC LEXIS 1740, at *23 & n.20 (July 25, 2008), citing *Wonsover v. SEC*, 205 F.3d 408, 413 (D.C. Cir. 2000). The record clearly demonstrates that X's, who was expressly seeking to stay involved in the financial services industry, intended to commit all acts that constituted his violation. X's counters that he did not act willfully because he relied on legal advice. But even if he had proved reasonable reliance on competent legal advice—which he has not—that would not negate a finding of willfulness or offer a defense to his violation. *John R. Brick*, 46 S.E.C. 43, 53-54 (1975).[28] X further claims that there was no showing of willfulness because he disclosed his activities to FINRA, and FINRA did not object. But X did not disclose anything to FINRA until 2005, at the earliest, which was well after he began providing services to Firms 4 and 5, and shortly before he ceased providing services. And he took no steps to verify whether FINRA in fact approved of his association with Firms 4 and 5. Thus, the record does not show that X was acting in reliance—reasonable or otherwise—on any assumption that FINRA had consented to his actions.

As another defense, X argues that he was not an associated person because he was a "consultant" and an "independent contractor." However, even if X was an independent contractor for other purposes, such a designation does not address what his status is under the Exchange Act. *Cf. William V. Giordano*, Exchange Act Rel. No. 36742, 1996 SEC LEXIS 71, at *11 (Jan. 19, 1996) (settlement order) ("The Commission does not recognize the concept of 'independent contractors' for purposes of the Exchange Act."); *Voluntary Benefit Sys. Corp. of America*, 1995 SEC No-Act. LEXIS 814, at *3 (Nov. 14, 1995) ("[M]erely designating a salesperson as an 'independent contractor' does not resolve his or her status under the Exchange Act."); *Diane Brunell Kaechele*, Exchange Act Rel. No. 35459, 1995 SEC LEXIS 607, at *11 n.4 (Mar. 8, 1995) (settlement order) (finding that a "consultant" was an associated person of the firm); *see also Books and Records Requirements for Brokers and Dealers Under the Securities Exchange Act of 1934*, 66 Fed. Reg. 55818, 55820 (Nov. 2, 2001) ("The Commission interprets the term associated person to include any independent contractor, consultant, franchisee, or other person providing services to a broker-dealer equivalent to those services provided by the persons specifically referenced in the statute.").

In sum, we find that X associated with Firms 4 and 5 in violation of the Bar Order because he engaged in numerous activities for Firms 4 and 5 that required that he be registered. X, therefore, engaged in "intervening misconduct" since the statutorily disqualifying event.[29]

---

[28] If proved, reasonable reliance on legal advice potentially impacts the severity of a violation. *See FINRA Sanction Guidelines*, at 6 (2007) (Principal Considerations in Determining Sanctions, No. 7), http://www.finra.org/web/groups/enforcement.documents.enforcement/p011038.pdf [hereinafter *Guidelines*]; *Brick*, 46 S.E.C. at 54 ("Reasonable reliance on counsel's opinion can be a weighty mitigative factor."). We address this below.

[29] Member Regulation deems certain statements that X made in this proceeding concerning his statutorily disqualifying misconduct to reflect attempts to avoid taking responsibility for his actions and to shift blame, and it argues that such statements reflect additional "new information" that warrant denial of this Application. But X advanced many of these same

[Footnote continued on next page]

e. Severity of X's Intervening Misconduct

To determine the impact that X's intervening misconduct should have on this Application, we consider the principles expressed in the FINRA Sanction Guidelines. We conclude that X's intervening misconduct was, at a minimum, a serious violation.

Several aggravating factors are present. X's association with Firms 4 and 5 resulted in at least $75,000 in monetary gain, and the potential for much more.[30] The nature and extent of X's activities and responsibilities involved him in the management of the broker-dealers' securities business.[31] The two-month duration of X's violation was a significant period of time, especially considering that he terminated the relationship with Firms 4 and 5 not because he recognized that he was acting in violation of the Bar Order, but because he was not getting paid what he believed he was entitled to be paid.[32] X's violation was reckless.[33] X knew that the Commission had barred him from associating with broker-dealers to "protect investors and the markets." Yet X constructed businesses and contracts that specifically aimed to circumvent the Bar Order, flouting not only its text but also its intent.

X argues that he relied on legal advice that his involvement with Firms 4 and 5 was permitted.[34] We find that X credibly testified that he sought legal advice on the question of what kinds of services he could provide to a broker-dealer without violating the Bar Order. However, a party asserting reasonable reliance on counsel "must provide sufficient evidence . . . that the [person] made full disclosure to counsel, appropriately sought to obtain relevant legal advice, obtained it, and then reasonably relied on the advice." *Howard Brett Berger*, Exchange Act Rel. No. 58950, 2008 SEC LEXIS 3141, at *40 (Nov. 14, 2008), *petition for review denied*, No. 09-0062 (2d Cir. Oct. 1, 2009). X failed to demonstrate each of these elements.

[cont'd]

arguments before the Commission during the administrative process that led to the Bar Order, and the Commission saw fit to bar X with a right to reapply within two years. We do not think *Van Dusen*'s instruction to consider "new information" reaches statements that a statutorily disqualified person makes after the Commission imposes a bar order that are essentially the same as the statements and arguments he made before the Commission during the administrative litigation that led to the bar order.

30 *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 17).

31 *See Guidelines*, at 46 (Principal Considerations in Determining Sanctions, No. 1).

32 *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 9).

33 *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13).

34 *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 7).

X did not prove what legal advice he obtained prior to 2005, the date he first received a written legal opinion from his attorney concerning the permissible scope of his activities. *Berger*, 2008 SEC LEXIS 3141, at *40-41 ("[I]t isn't possible to make out an advice-of-counsel claim without producing the actual advice from an actual lawyer.") (citations and internal quotation marks omitted). As a result, X failed to demonstrate what legal advice he obtained prior to his activities between 2005—the effective date of the Bar Order—and 2005.[35]

The legal opinion Letter 1 shows what legal advice X received as of that date, but X failed to prove that he relied on it. Most of the Letter 1 opinion letter consisted of advice concerning what X *could not* do with Firms 4 and 5.[36] One of the few snippets of advice concerning what X *could do* stated that a "possible means of interacting with Firms 4 and 5 . . . that does not appear to involve 'association' . . . is through a separate entity providing recruitment and/or training services for broker/dealer salespersons," and drew an analogy to "staffing agencies." In addition, the letter stated that "you may be able to receive compensation from the broker/dealers or through contacts with parties you recruit and/or train whereby the recruits remit a percentage of their commissions." X's activities, however, exceeded some aspects of this legal advice, and were not consistent with other aspects. In this regard, X did not limit his activities to recruitment and training of salespersons, and his compensation package was not structured to be a percentage of commissions.

To whatever extent X *did* rely on Letter 1, his reliance was not reasonable. Letter 1 cautioned X that "it is very important that you consult with us prior to engaging in any activity that may even be construed as involving association with broker/dealers or investment advisors so that we can reexamine the authorities in light of specific fact situations." The letter further warned that "it is somewhat difficult to give you a definite framework of acceptable interaction with broker-dealers." Moreover, the letter contained no mention of the Consulting Agreements that X had already signed, which raised serious questions of the reliability of the opinion letter. Considering such facts, X could not have reasonably relied on Letter 1 absent further discussions with his lawyers.

---

[35] Both X and his attorneys represented that, *prior* to the Bar Order going into effect, X's attorney had orally provided to him legal advice concerning the permissible scope of his activities with Firms 4 and 5. While we find these assertions to be credible, they do not demonstrate what legal advice was given. The first written legal opinion letter was dated 2005, but that letter does not state that it memorializes any legal advice that was previously provided or that it addresses the activities in which X had already engaged. Rather, that letter discusses only X's "future activities" with Firms 4 and 5.

[36] For example, the letter: (1) explained the titles or positions that he could not hold with Firms 4 and 5; (2) explained certain functions that were prohibited by the Bar Order; and (3) cautioned X to "avoid the appearance of direct or indirect control over a broker/dealer and vice versa."

On 2005, X's attorney provided a second opinion letter. Letter 2 was similar to Letter 1 in many respects, but significantly broadened certain recommendations concerning what functions X could handle, and substantially loosened the cautionary language that appeared in the first letter. Like the first letter, Letter 2 again advised that X could provide consulting services as an "independent contractor," but expanded the description of permissible consulting services beyond "the recruitment and/or training of salespersons" to include "mergers and acquisitions, strategic alliances and growth planning." In addition, Letter 2 scaled back the cautionary language by saying that X needed to consult further with his attorneys only as to future activities that were not specifically discussed in the letter.

To whatever limited extent X associated with Firms 4 and 5 after Letter 2, X could not have reasonably relied on the advice in Letter 2 legal opinion. Considering the unexplained broadening of the legal advice, the dropping of cautionary language, and the timing of the letter—penned one day before an interview with FINRA that addressed X's involvement with Firms 4 and 5 —the legal advice in the opinion letter was not reliable. Moreover, Letter 2 silently omitted the previous recommendation concerning how Firms 4 and 5 could compensate X consistent with the Bar Order, and again contained no mention of the compensation terms for which X had already contracted.

Considering the aggravating factors that are present, and the absence of mitigating factors, we find that X's intervening misconduct was a serious, and possibly egregious, violation. By itself, X's intervening misconduct shows that he remains a threat to the public and the markets, and warrants the denial of this Application.

VII. Conclusion

X engaged in serious intervening misconduct since his statutorily disqualifying event. For this reason, we find that it is not in the public interest, and would create an unreasonable risk of harm to the markets or investors, for X to associate with the Sponsoring Firm as a general securities representative. We therefore deny the Application.

On Behalf of the National Adjudicatory Council,

_____

Marcia E. Asquith
Vice President and Deputy Corporate Secretary