

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of the Continued Association of X ¹ as a General Securities Representative/Institutional Sales Trader with The Sponsoring Firm	<u>Redacted Decision</u> <u>Notice Pursuant to</u> <u>Rule 19h-1</u> <u>Securities Exchange Act</u> <u>of 1934</u> <u>SD09008</u> Date: 2009
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I. Introduction

On October 9, 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 continue to associate with the Firm as a general securities representative/institutional sales trader. In May 2009, a subcommittee (“Hearing Panel”) of FINRA’s Statutory Disqualification Committee held a hearing on the matter. X appeared at the hearing, accompanied by his proposed primary supervisor. FINRA Employee 1, FINRA Attorney 1, and FINRA Attorney 2, appeared on behalf of FINRA’s Department of Member Regulation (“Member Regulation”).

For the reasons explained below, we approve the Sponsoring Firm’s Application.² This

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 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). 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.

decision has been presented to NYSE Regulation, which concurs with this approval.

II. The Statutorily Disqualifying Event

X is statutorily disqualified because he pled guilty in August 2008, to two criminal offenses that are felonies in State 1: 1) failing to report an accident involving death; and 2) reckless homicide. The record shows, and X testified at the hearing, that he fell asleep while he was driving his car home early in the morning in March 2006. X testified that he was not under the influence of drugs or alcohol at the time of the accident. X's car struck a railway station building adjacent to the road, and part of the building collapsed. X was disoriented, and he walked away from the scene of the accident, leaving his disabled car. He testified that he was not aware that anyone was in the railway building. When police and firefighters converged at the scene of the accident shortly thereafter, they also did not realize that a railway employee was inside the building. One of the firefighters entered the railway building about 10 or 15 minutes after arriving on the scene and discovered that a female employee was present and was covered in debris. The firefighters transported her from the scene to the hospital. She died of injuries sustained in the accident shortly thereafter.³

X further testified that he contacted an attorney on the same day as the accident. On the advice of his attorney, X did not turn himself in to the police until they had a warrant for his arrest, which occurred in March 2006. During the 19-day period between the accident and X's arrest, X's attorney was in contact with the police.

In August 2008, the state court sentenced X to three years of probation and 250 hours of community service. The record shows that X is currently in compliance with the terms of his probation and that he has served approximately 100 hours of community service.

III. Background Information

A. X

X first registered in the securities industry as a general securities representative in February 1988, and he qualified as a uniform securities agent in April 1988. He has been

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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.

³ X also testified that he settled a civil suit with relatives of the deceased for a confidential amount of money.

associated with the Sponsoring Firm since December 2006.⁴ The record shows that X fully disclosed the felony charges against him when he joined the Sponsoring Firm, and that he and the Firm promptly updated X's Uniform Application for Securities Industry Registration or Transfer ("Form U4") following his felony conviction and sentencing in August 2008. X was previously associated with eight firms between April 1988 and March 2006.

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

B. The Firm

The Sponsoring Firm is based in City 1, State 1, and it has been a FINRA member since May 2004. The Firm represents that it has one office of supervisory jurisdiction (its home office), two branch offices, 18 registered representatives, and seven registered principals. The Firm engages in a general securities business.

FINRA took no action after conducting routine examinations of the Sponsoring Firm in November 2004 and January 2009.

In June 2009, the Sponsoring Firm consented to a Letter of Acceptance, Waiver, and Consent ("AWC") for failing to transmit certain transactions to the Order Audit Trail System ("OATS"). FINRA censured the Sponsoring Firm and fined it \$20,000 for the OATS violations. The record shows no other complaints, disciplinary proceedings, or arbitrations against the Firm.

IV. X's Proposed Business Activities and Supervision

The Sponsoring Firm proposes to continue to employ X as a general securities representative/institutional sales trader. The Firm represents that X "is responsible for contacting institutions who are involved in the Financial industry and pitching the Institutional Trading services provided by [the Firm] in an attempt to have those institutions send their order[s] to [the Firm]." Because X is not qualified to act as an equity trader limited representative (Series 55), the Firm has agreed to limit his trading activities to those that do not require a Series 55. The Sponsoring Firm will compensate X "on a commission basis with an average compensation approaching 25% of the revenue he generates."

The Firm proposes that the Proposed Supervisor, who is the chief compliance officer and managing partner of the Sponsoring Firm, will be X's primary supervisor. The Proposed Supervisor is a 50 per cent owner of the holding company that owns a 100 per cent interest in the Sponsoring Firm. The Proposed Supervisor will supervise X on-site at the Firm's home office.

⁴ This is consistent with FINRA's interpretation of Art. III, Sec. 3(c) of FINRA's By-Laws, permitting individuals who become statutorily disqualified while they are employed to continue working pending the outcome of the statutory disqualification process.

The Proposed Supervisor first registered as a general securities representative in February 1986, and he qualified as a general securities principal in February 2004. The Proposed Supervisor became associated with the Sponsoring Firm in January 2004, where he currently supervises four individuals. Prior to that time, he was associated with seven other firms from 1986 to 2004.

The record shows no criminal, disciplinary or regulatory proceedings, complaints, or arbitrations against the Proposed Supervisor.

The Sponsoring Firm also proposes that when the Proposed Supervisor is not available, Employee 1, a managing partner of the Firm, will supervise X. Employee 1 qualified as a general securities representative in February 1984 and a general securities principal in April 2004. He has been employed by the Sponsoring Firm since January 2004, and the record shows no criminal, disciplinary or regulatory proceedings, complaints, or arbitrations against him.

V. Member Regulation's Recommendation

Member Regulation recommends that the Application be approved, subject to the specified terms and conditions of heightened supervision over X set forth below.

VI. Discussion

In reviewing this type of application, we consider whether the particular felonies at issue, examined in light of the circumstances related to the felonies, and other relevant facts and circumstances, create an unreasonable risk of harm to the market or investors.⁵ We assess the totality of the circumstances in reaching a judgment about X's future ability to deal with the public in a manner that comports with FINRA's requirements for high standards of commercial honor and just and equitable principles of trade in the conduct of his business. In so doing, we recognize that the sponsoring firm has the burden of demonstrating that the proposed association of the statutorily disqualified individual is in the public interest and does not create an unreasonable risk of harm to the market or investors. *See Continued Association of X*, SD06003, slip op. at 5 (NASD NAC 2006) (redacted decision).

Factors that bear on our assessment include the nature and gravity of the statutorily disqualifying misconduct, the time elapsed since its occurrence, the restrictions imposed, whether the person has engaged in any intervening misconduct, and the potential for future regulatory

⁵ *See Frank Kufrovich*, 55 S.E.C. 616, 625 (2002) (upholding FINRA's denial of a statutory disqualification applicant who had committed non-securities related felonies "based upon the totality of the circumstances" and FINRA's explanation of the bases for its conclusion that the applicant would present an unreasonable risk of harm to the market or investors); *Timothy H. Emerson, Jr.*, Exchange Act Rel. No. 60328, 2009 SEC LEXIS 2417, at *14 (July 17, 2009) (stating that FINRA "appropriately weigh[ed] all the facts and circumstances surrounding [the applicant's] felony conviction and [the firm's] proposed supervisory plan").

problems. We also consider whether the sponsoring firm has demonstrated that it understands the need for, and has the capability to provide, adequate supervision over the statutorily disqualified person.

After carefully reviewing the entire record in this matter, we find that the Sponsoring Firm has met its burden, and we conclude that X's continued participation in the securities industry will not present an unreasonable risk of harm to the market or investors. Accordingly, for the reasons set forth below, we approve the Application for X to continue to associate with the Firm as a general securities representative/institutional sales trader, subject to the supervisory terms and conditions detailed herein.

As an initial matter, we acknowledge the seriousness of X's criminal conviction. We recognize, however, that a State 1 state court has sentenced X to three years of probation and 250 hours of community service. We have been provided with evidence that X is in compliance with the terms of his probation, and that he has completed 100 hours of his community service. We also find that X credibly testified as to his remorse about the tragic accident and his actions in leaving the scene. Moreover, X has testified that he has not engaged in any intervening misconduct, and he has been continuously employed in the securities industry since 1989 without incident.

We also find that the Firm and the proposed supervisor are qualified to supervise a statutorily disqualified individual such as X. The Sponsoring Firm has one disciplinary matter on its record – the June 2009 AWC for OATS violations. The Proposed Supervisor has been a general securities principal since 2004, has no disciplinary history, and will be located in close proximity to X. Further, although the Proposed Supervisor currently supervises four other individuals at the Firm, we also find credible the Proposed Supervisor's testimony that he will be able to supervise X pursuant to heightened supervisory conditions and that he fully understands the responsibility that he is undertaking in doing so. Moreover, we are satisfied that the following heightened supervisory procedures will enable the Firm to reasonably monitor X's activities on a regular basis:⁶

1. *The Sponsoring Firm will amend its written supervisory procedures to state that the Proposed Supervisor is the primary supervisor responsible for X;
2. X will not maintain discretionary accounts;
3. *The Proposed Supervisor will review and pre-approve each securities account prior to the opening of the account by X. The Proposed Supervisor will document his review by dating and signing the account paperwork, which he will keep

⁶ The items that are denoted by an asterisk are heightened supervisory conditions for X and are not standard operating procedures of the Firm.

segregated at the Sponsoring Firm's home office for review during any statutory disqualification examination;

4. *Because X is not qualified as a Series 55, he will not process or execute any trades that require registration as a Series 55 (i.e., he will not engage in proprietary trading or in the execution of transactions on an agency basis in equity, preferred, or convertible debt securities in Nasdaq or over-the-counter markets). If such orders come to X's attention, he will immediately forward them to Employee 2 for processing and execution. X will inform the Proposed Supervisor each time he forwards such trades to Employee 2. The Proposed Supervisor will keep a record of the forwarding of such trades and keep that record segregated for review during any statutory disqualification examination;
5. *X will not act in a supervisory capacity;
6. *X will not: a) share accounts with others; b) split or share commissions with others (other than his standard commission split with the Sponsoring Firm, as outlined in his employment agreement); or c) receive overrides on the commissions, fees, or profits generated by others;
7. *All complaints pertaining to X, whether oral or written, will be immediately referred to the Proposed Supervisor for review, and then to the Firm's compliance department. The Proposed Supervisor will prepare a memorandum to the file as to what measures he took to investigate the merits of the complaint (e.g., contact with the customer) and the resolution of the matter. The Proposed Supervisor will segregate documents pertaining to these complaints for review during any statutory disqualification examination;
8. *X will not engage in training or advising registered representatives or persons seeking to become registered representatives;
9. *The Sponsoring Firm will only permit X to conduct business requiring registration with FINRA at its home office, which is the primary office of The Proposed Supervisor;
10. The Sponsoring Firm will review X's incoming and outgoing written and electronic correspondence on a weekly post-review basis, covering at least 25 per cent of all covered correspondence;
11. *If the Proposed Supervisor is out of the office, Employee 1 will act as X's Interim supervisor;
12. *For the purposes of client email communication, X will be allowed to use only an email account that is held at the Firm, with all emails being filtered through the Firm's email system. If X 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. X will also inform the Firm of all outside email accounts that he maintains. The Proposed Supervisor will conduct a weekly review of all email messages that are either sent or received by X, and will preserve X's email messages and segregate them for review during any statutory disqualification examination;

13. *For the duration of X's statutory disqualification, the Sponsoring Firm must obtain prior approval from Member Regulation if it wishes to change X's primary supervisor from the Proposed Supervisor to another person; and
14. *The Proposed Supervisor must certify quarterly (March 31, June 30, September 30, and December 31) to the Firm's compliance department that the Proposed Supervisor and X are in compliance with all of the above conditions of heightened supervision to be accorded X.

FINRA certifies that: 1) X meets all applicable requirements for the proposed employment; 2) the Firm represents that it is also registered with NYSE Arca; and 3) X, the Proposed Supervisor, and Employee 1 represent that they are not related by blood or marriage.

VII. Conclusion

Accordingly, we approve the Sponsoring Firm's Application to continue to employ X as a general securities representative/institutional sales trader, subject to the above-mentioned heightened supervisory procedures. In conformity with the provisions of Exchange Act Rule 19h-1, the continued association of X as a general securities representative/institutional sales trader 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,

Marcia E. Asquith
Senior Vice President and Corporate Secretary