

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

<p>In the Matter of the Association of</p> <p>X</p> <p>as an</p> <p>Associated Person</p> <p>with</p> <p>The Sponsoring Firm</p>
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Redacted Decision

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

Decision No. SD04015

Date: 2004

On June 15, 2004, the Sponsoring Firm¹ (or "the Firm") filed a Membership Continuance Application ("MC-400" or "the Application") seeking to permit X, a person subject to a statutory disqualification, to associate with the Firm as a technical support customer service representative. A hearing was not held in this matter. Rather, pursuant to NASD Procedural Rule 9523, NASD's Department of Member Regulation ("Member Regulation") recommended to the Chair of the Statutory Disqualification Committee that the Firm's Application be approved, subject to the terms and conditions of supervision set forth below.

A. Basis for Statutory Disqualification

X is statutorily disqualified pursuant to Article III, Section 4(g)(2) of NASD's By-Laws because in September 1996, a jury found him to be guilty of the crime of Battery with Serious Bodily Injury and Assault By Means Likely to Produce Great Bodily Injury, a felony in State 1.² The court sentenced X to pay \$200 in restitution, pay a \$1000 fine, and serve 15 days in county jail and three years of probation. X served five days of 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 X explained the circumstances leading to his arrest and conviction as follows. He stated that he and his fiancé attended a party in May 1996. During the course of that evening, the subject of the assault attempted to force himself on X's fiancé in a bedroom. X further stated that when he attempted to remove the individual from the premises, the victim advanced towards him (X). X stated that he punched the victim in the face, and was later arrested after admitting that he used physical force against the victim.

15-day jail sentence, and he completed his probation and community service requirements by April 2002.

B. Background Information

1. X

X has never been registered in the securities industry. He is seeking to work in a non-registered capacity with the Sponsoring Firm, as a technical support customer service representative. Notwithstanding his statutory disqualification, X associated with the Firm without NASD approval as a contractor in 2001, and as an employee in 2002. Member Regulation staff states that during a telephone conversation with the Firm in August 2004, it questioned the Firm about the circumstances that led to X's employment in an unapproved status. During that discussion, the Sponsoring Firm represented that X disclosed his conviction at the time he was hired, and the Firm submitted documentation related to X's conviction to NASD's Registration and Disclosure Department of the Central Registration Depository ("CRD[®]"). Member Regulation asserts that, through no fault of the Firm, the paperwork related to X's conviction was misrouted. The Firm, unaware that the documentation had not been received by NASD, assumed that X's association was deemed appropriate. As soon as Member Regulation advised the Sponsoring Firm of the situation in the August 2004 telephone conversation, the Firm promptly filed this Application on X's behalf and terminated his employment, pending the outcome of the Application.

The record shows no other regulatory or disciplinary actions taken against X.

2. The Firm

The Sponsoring Firm became a member of NASD in February 1973. The Firm has 2,464 offices of supervisory jurisdiction ("OSJ") and 1,083 branch offices. The Sponsoring Firm employs 2,972 registered principals, 5,510 registered representatives, and 899 other employees. The Firm is a full service securities broker-dealer.

The Sponsoring Firm has the following disciplinary history:

a) Routine Examinations

NASD issued the Firm Letters of Caution ("LOC") following both the 2000 and 2002 routine examinations. In the 2000 LOC, NASD cited the Firm for several violations, including improper registration of offices, failure to have a schedule for inspecting satellite offices, improper documentation of prospectus delivery, improper documentation of customer investment switches, and failure to obtain complete information on customer account forms. The Firm responded to the LOC and outlined the measures it was undertaking to correct the noted deficiencies.

Following the 2002 routine examination, NASD cited the Firm for inadequate recordkeeping on new account forms and improper documentation of customer complaints. In its response to the LOC, the Firm detailed the measures it had undertaken to correct the noted deficiencies.

NASD has not yet completed the Firm's 2004 routine examination.

b) Special Examinations

NASD also issued an LOC to the Firm in May 2004, following an advertising examination, for failure to adhere to advertising rules in disseminating a seminar invitation.

c) Letters of Acceptance, Waiver, and Consent

In February 2003, the Sponsoring Firm consented to a letter of Acceptance, Waiver, and Consent ("AWC") with NASD's Department of Market Regulation ("Market Regulation"). NASD fined the Firm \$5,000 and ordered it to revise its written supervisory procedures for failing to have proper written procedures to supervise a registered representative who had recommended securities to customers without providing the relevant investment information.

In February 2003, the Firm consented to another AWC with Market Regulation for trade reporting violations in the Fixed Income Pricing System ("FIPS"). NASD fined the Sponsoring Firm \$5,000.

d) Securities and Exchange Commission Action

In February 2004, the Securities and Exchange Commission imposed a cease and desist order against the Firm for selling mutual fund shares without providing certain customers with reductions in front-end loads or "breakpoint" discounts. The Commission censured the Firm, ordered it to cease and desist from breakpoint violations, ordered it to pay a civil monetary penalty of \$2,232,805 (one-half to the Commission and one-half to NASD), and required it to implement new procedures to prevent future violations.

NASD brought a related action against the Firm for breakpoint violations. The Firm consented to a February 2004 AWC that imposed a censure, a fine of \$2,232,805 (one-half payable to NASD and one-half payable to the Commission), a requirement to provide refunds to customers, and a requirement to implement procedures to provide appropriate breakpoint discounts to customers.

e) State Disciplinary Actions

In October 1996, State 2 Securities Commission brought a proceeding against the Firm because one of its registered representatives acted as the manager of a branch office without an appropriate securities license; the Firm was unable to produce certain documentation related to customer accounts; and a representative recommended

unsuitable securities transactions to two customers. State 2 Securities Commission did not sanction the Firm because it agreed to pay \$19,304.94 in investigative costs.

In May 1997, State 3 Securities Commission filed a Notice of Intent to Invoke Administrative Sanctions against the Firm for failure to adequately supervise a registered representative. In lieu of a fine or censure, the Firm agreed to pay partial restitution in the amount of \$39,644.

C. X's Proposed Business Activities and Supervision

The Sponsoring Firm proposes that X will be employed in a non-registered capacity in the Firm's home office, located in State 1. Specifically, X will be a research technical support representative in the Firm's Information Technology Services department. X's primary responsibility will be to provide technical support to the Sponsoring Firm's financial advisers. The Firm will compensate X with a salary.

The Firm proposes that the Proposed Supervisor will be X's primary, responsible supervisor. The Proposed Supervisor has been employed in the Firm's home office since June 2002, and he has been registered as a general securities representative and securities principal since March and September 2000, respectively.

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

D. Discussion

After carefully reviewing the entire record in this matter, we approve the Sponsoring Firm's Application to permit X to associate with the Firm in a non-registered capacity, pursuant to the terms and conditions of supervision described below.

In reviewing this type of application, we have considered whether the particular felony at issue, examined in light of the circumstances related to the felony and other relevant facts and circumstances, creates an unreasonable risk of harm to the market or investors.³ For the reasons set forth below, we conclude that X's association with the Sponsoring Firm will not present an unreasonable risk of harm to the market or investors.

First, the Sponsoring Firm will employ X in a non-registered capacity with no access to customer funds or accounts. X will be providing technical support to the Firm's financial advisers. Given these circumstances, X does not pose an unreasonable risk of harm to the investing public.

³ See Frank Kufrovich, Exchange Act Rel. No. 45437, 2002 SEC LEXIS 357, at *16 (Feb. 13, 2002) (upholding NASD's denial of a statutory disqualification applicant, who had committed non-securities related felonies, "based upon the totality of the circumstances" and NASD's explanation of the bases for its conclusion that the applicant would present an unreasonable risk of harm to the market or investors).

Moreover, X's statutorily disqualifying activity is not recent or securities or financial related, and it did not involve a finding of dishonest conduct. The actual criminal conduct occurred in May 1996, when he was 25 years old, and it is the only negative mark on an otherwise blemish-free record. We have also considered the fact that X satisfactorily completed his probation and community service by April 2002.

The Proposed Supervisor is a qualified general securities principal who has been employed in the securities business for more than five years with no formal or informal regulatory history.

Finally, we conclude that the Firm's disciplinary history, particularly given the Sponsoring Firm's large size and the numerous transactions in which it engages on a daily basis, does not cause us to doubt the Firm's ability to supervise X. We also note that the Sponsoring Firm earlier permitted X to associate with the Firm in an unapproved status. We find, however, that the Firm was forthright in explaining its mistake in allowing X to be employed there, notwithstanding his statutory disqualification. Also, the Firm terminated X as soon as it learned from Member Regulation that X was associated improperly.

Given the nature of X's non-securities related felony offense and his proposed employment in a non-registered capacity, we conclude that the following supervisory conditions will provide the compliance measures necessary to monitor X's activities:

- 1) The Sponsoring Firm will employ X as a research technical support representative. His main function will be to provide technical support to the Sponsoring Firm's financial advisers and their staff;
- 2) X will act only in a non-registered capacity;
- 3) X will have no access to customer funds and securities;
- 4) X will have "view only" access to the Firm's books and records;
- 5) X will not have any customer contact and will not interact with clients regarding their accounts;
- 6) X will have no supervisory responsibilities or duties;
- 7) The Proposed Supervisor will supervise X's activities and ensure compliance with the above-described conditions; and
- 8) 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 supervisor from the Proposed Supervisor to another person.

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

The Sponsoring Firm is also a member of Exchange 1. NASD has filed concurrence notices with Exchange 1, pursuant to a prior agreement with Exchange 1 under SEC Rule 17d-2.

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

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney
Senior Vice President and Corporate Secretary