

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
NASD

In the Matter of the Association of	<u>Redacted Decision</u>
X	<u>Notice Pursuant to</u>
as an	<u>Rule 19h-1</u>
Investment Company Products/ Variable Contracts Limited Representative	<u>Securities Exchange Act</u> <u>of 1934</u>
with	<u>Decision No. SD07004</u>
The Sponsoring Firm	Date: 2007

I. Introduction

On June 22, 2006, the Sponsoring Firm¹ (“the Firm”) filed a Membership Continuance Application (“MC-400” or “the Application”) with NASD’s Department of Registration and Disclosure, seeking to permit X, a person subject to a statutory disqualification, to associate with the Firm as an investment company products/variable contracts limited 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 that the Chair of the Statutory Disqualification Committee, acting on behalf of the National Adjudicatory Council, approve X’s proposed association with the Sponsoring Firm pursuant to the terms and conditions set forth below.

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

II. The Statutorily Disqualifying Event

X is statutorily disqualified because he willfully failed to disclose material facts on a Uniform Application for Securities Industry Registration or Transfer (“Form U4”) — that in 1999 he had been charged with, and pled guilty to, carrying a concealed weapon, a felony in State 1.² See Art. III, Sec. 4(f) of NASD’s By-Laws. In 2003, NASD’s Department of

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 The State 1 court fined X \$2,500 and assessed him costs of \$100 and a crime victim fee of \$60.

Enforcement (“Enforcement”) accepted X’s submission of a Letter of Acceptance, Waiver and Consent (“AWC”) for this violation. NASD suspended X for six months in all capacities and imposed a \$5,000 fine. X paid the fine and served the suspension from September 15, 2003, until March 14, 2004. The AWC also specifically provided that:

[X] understand[s] that this settlement includes a finding that . . .
[he] willfully failed to disclose a material fact on a Form U-4, and that . . .
this omission makes [him] subject to a statutory disqualification
with respect to association with a member.

In the AWC, X consented to NASD’s findings that, in September 1999, he was charged with the felony of carrying a concealed weapon and that, in December 1999, he pled guilty to this felony offense and was convicted. X also consented to the finding that thereafter he willfully failed to disclose this material fact by amending his Form U4 with his then employer, Firm One, in violation of NASD Conduct Rule 2110 and IM 1000-1.

On September 27, 2002, a State 1 court set aside X’s felony conviction pursuant to State 1 Criminal Law 750.224(F)(4). On that same date, the judge reduced the conviction against X to a misdemeanor firearms violation that does not constitute a separate statutory disqualification. *See* Art. III, Sec. 4(g)(1) of NASD’s By-Laws.

III. Background Information

A. X

X first qualified in the securities industry as an investment company products/variable contracts limited representative in January 1986, and he requalified in that capacity in April 2006. He qualified as an investment company products/variable contracts limited principal in August 1988 and requalified in that capacity in April 2006.³

X was previously employed by Firm 1 from November 1985 until September 2001. He was engaged in the construction business from September 2001 until June 2003, when he began selling insurance products for Firm 2.⁴

³ X had to requalify because he had not been registered in the securities industry for more than two years. X terminated from Firm One in September 2001 and has not been engaged in securities work since that time. He filed a Form U4 in March 2006 to become associated with the Sponsoring Firm through NASD’s MC-400 process. At that time, in accordance with its requirements, Member Regulation requested that X requalify in the capacity in which he seeks to associate in order to complete the Application. X is requesting only that he be permitted to associate with the Sponsoring Firm as an investment company products/variable contracts limited representative, even though he also requalified as an investment company products/variable contracts limited principal.

⁴ The Firm represents that Firm 2 and the Sponsoring Firm are two separate companies with no ownership stake in each other.

X has two other incidents on his disciplinary history. In June 1998, he was convicted of a firearms safety inspection violation, a misdemeanor in State 1. In addition, in September 2001, Firm 1 terminated X for failing to disclose his felony charge and conviction.⁵

B. The Firm

The Sponsoring Firm became an NASD member in November 2005. The Firm has 19 offices of supervisory jurisdiction (“OSJ”) and 92 branch offices. The Firm represents that it employs 193 registered representatives, 26 registered principals, and eight other employees. The Firm engages in sales of mutual funds, municipal securities, variable annuities, and variable universal life products.

NASD has commenced, but not yet completed, its 2006 routine examination of the Sponsoring Firm. The record shows no complaints, disciplinary proceedings, or arbitrations against the Firm.

IV. X’s Proposed Business Activities and Supervision

The Firm proposes to employ X as an independent contractor, investment company products/variable contracts limited representative in a branch office in City 1, State 1. The Firm will compensate X on a commission-only basis.

The Sponsoring Firm proposes that the Proposed Supervisor, who has been employed by the Firm since January 2006, will be X’s primary, responsible supervisor. The Proposed Supervisor is an OSJ supervisor in City 2, State 1, which is approximately two and one-half hours driving distance from the branch office in which X will be located. The Proposed Supervisor has been employed in the securities industry since 1986, and he became registered as an investment company products/variable contracts limited principal in August 1988.

We are not aware of any disciplinary or regulatory proceedings, complaints, or arbitrations against the Proposed Supervisor.

⁵ On the Form U4 that X submitted to the Sponsoring Firm in March 2006, he stated that he had advised his supervisor at Firm 1 of the felony charge and conviction, and that his then-attorney and his supervisor both advised him not to disclose the circumstances to anyone else at Firm 1 until the outcome of X’s planned motion to set aside the felony conviction. The record includes a February 25, 2002 letter from X’s former attorney to a State 1 judge, stating that he had been “going through some personal problems and ultimately divorce” when he represented X, and that he had not been “at his personal best” when he recommended that X plead guilty to the felony charge.

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

After carefully reviewing the entire record in this matter, we approve the Firm's Application to employ X as an investment company products/variable contracts limited representative, subject to the supervisory terms and conditions set forth below.

A. The Legal Standards

We acknowledge that X, as a registered representative, was responsible for knowing the rules of the securities industry and for providing information to Firm 1 on a timely basis to update his Form U4. *See, e.g., Robert E. Kauffman*, 51 S.E.C. 838, 840 (1993) ("Every person submitting registration documents [to NASD] has the obligation to ensure that the information printed therein is true and accurate."), *aff'd*, 40 F.3d 1240 (3d Cir. 1994) (table). We note, however, that X asserts that he did timely bring the 1999 felony criminal charge and conviction to the attention of his supervisor at Firm 1, but was advised by that supervisor and his then attorney not to inform anyone else at Firm 1 until X had achieved his goal of reducing that conviction to a misdemeanor. X also fully disclosed the two weapons charges against him, as well as the 2003 NASD AWC, to the Sponsoring Firm when he applied for a position there in March 2006. Further, X has been employed in the securities industry since 1986 without any history of customer complaints or other reportable events.

Moreover, Enforcement weighed the gravity of X's failure to disclose when it approved the AWC in August 2003. Rather than imposing a bar, Enforcement concluded that a six-month suspension was an appropriate sanction for X, which he has served. In such circumstances, the Commission has instructed NASD to evaluate a statutory disqualification application pursuant to the standards enunciated in the SEC's decisions in *Paul Van Dusen*, 47 S.E.C. 668 (1981) and *Arthur H. Ross*, 50 S.E.C. 1082 (1992). *May Capital Group, LLC and Melvin Rokeach*, Exchange Act Rel. No. 53796, 2006 SEC LEXIS 1245, at *22 (May 12, 2006), *recon. denied*, Exchange Act Rel. No. 54711, 2006 SEC LEXIS 2560, at *15-16 (Nov. 6, 2006) (holding that NASD must apply *Van Dusen* standards to the membership continuance applications of statutorily disqualified individuals whose disqualifications resulted from NASD enforcement action).

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

purposes of the Exchange Act and unfair to deny an application for re-entry. *Van Dusen*, 47 S.E.C. at 671.

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

B. Application of the *Van Dusen* Standards

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

First, the record shows that X has no complaints, regulatory actions, or criminal history since NASD's 2003 AWC.

Second, we look to the nature and disciplinary history of the Sponsoring Firm. We note that the Firm has no NASD examination history as it has been an NASD member only since 2005. We find, however, that the Firm has proposed a comprehensive supervisory plan to ensure that it will be able to maintain future compliance with the plan of heightened supervision for X.

Third, we find that the proposed supervisor is well qualified. He has been in the securities industry for more than two decades without any disciplinary history, and he has been an investment company products/variable contracts limited principal since 1988. Although we were initially concerned by the fact that the Sponsoring Firm will be physically located some distance away from X, we are satisfied that the following heightened supervisory procedures address this issue and 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. The Proposed Supervisor will work from the Firm's OSJ in City 2, State 1, while X will be located in a branch office in City 1, State 1;
3. * The Proposed Supervisor will visit X's office on a twice monthly basis (every two weeks);
4. The Proposed Supervisor will review and initial all of X's trade and check blotters weekly. X will fax the trade and check blotters to the Proposed Supervisor for the weekly review. In addition, the Firm's compliance officer,

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

Employee 1⁷, will electronically review and initial X's trade and check blotters on a daily basis.

the Proposed Supervisor and Employee 1 will segregate copies of the reviewed trade and check blotters for ease of review;

5. *The Proposed Supervisor will review X's incoming written correspondence (which will include e-mail communications) upon its arrival and will review X's outgoing correspondence before it is sent. The Firm will scan and send all incoming and outgoing correspondence to the Proposed Supervisor, for his review, prior to it being received or sent by X;
6. *The Proposed Supervisor will randomly review 10% of X's client files, on a monthly basis. He will indicate the findings of his review in a memo, which he will keep segregated for ease of review;
7. *The Sponsoring Firm will require X to attend both of the Firm's compliance meetings. The Firm will also require X to attend at least two extra Firm Element courses, to be chosen by the chief compliance officer;
8. *X will not act in a supervisory capacity (unless he submits an MC-400 application and is approved to do so);
9. * If the Proposed Supervisor is out of the office, the Proposed Supervisor 2⁸, a registered principal of the Firm, will act as X's interim supervisor;
10. *All complaints pertaining to X, whether verbal or written, will be immediately referred to the Proposed Supervisor for review and then to the compliance department of the Firm. The Proposed Supervisor will prepare a memo 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 keep documents pertaining to these complaints segregated for ease of review;
11. *The Firm must obtain prior approval from Member Regulation if it wishes to change X's responsible supervisor from the Proposed Supervisor to another person; and

⁷ Employee 1 has been in the financial services industry since 1991. He became an investment company products/variable contracts limited principal in 2001 and a general securities principal in 2004. He has no formal disciplinary history.

⁸ The Proposed Supervisor 2 works from a separate Firm branch office in City 1, State 1. He has been employed in the securities industry since 1996, became registered as an investment company products/variable contracts limited principal in January 2000, and has no disciplinary history.

12. * The Proposed Supervisor must certify quarterly (March 31st, June 30th, September 30th, and December 31st) to the Firm's compliance department that he and X are in compliance with all of the above conditions of heightened supervision to be accorded to X.

NASD certifies that: 1) X meets all applicable requirements for the proposed employment; 2) the Firm represents that it is not a member of any other self-regulatory organization; 3) the Firm represents that it does not employ any other statutorily disqualified individuals; and 4) the Firm represents that the Proposed Supervisor and X are not related by blood or marriage.

VII. Conclusion

Accordingly, we approve the Sponsoring Firm's Application to employ X as an investment company products/variable contracts limited representative. In conformity with the provisions of SEC Rule 19h-1, the association of X as an investment company products/variable contracts limited representative 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
Vice President and Deputy Corporate Secretary