

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of the
Continued Membership
of
J. H. Darbie & Co., Inc.

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

SD-2199

Date: April 15, 2019

I. Introduction

On May 2, 2018, J. H. Darbie & Co., Inc. (“J.H. Darbie” or “Firm”) submitted a Membership Continuance Application (“MC-400A” or “Application”) with FINRA’s Department of Registration and Disclosure.¹ The Application seeks to permit the Firm, a FINRA member subject to statutory disqualification, to continue its membership with FINRA notwithstanding its disqualification. A hearing was not held in this matter. Rather, pursuant to FINRA Rule 9523(b), FINRA’s Department of Member Regulation (“Member Regulation”) approves the Firm’s Application and is filing this Notice pursuant to Rule 19h-1 of the Securities Exchange Act of 1934 (“Exchange Act”).

II. The Statutorily Disqualifying Event

J.H. Darbie is subject to statutory disqualification pursuant to Section 3(a)(39)(F), incorporating by reference Section 15(b)(4)(D) of the Exchange Act, because the U.S. Securities and Exchange Commission (“SEC”) issued an order on March 27, 2018, in which it found that J.H. Darbie willfully violated: (1) Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder, which require broker-dealers to maintain a certain minimum net capital; and (2) Section 17(a)(1) of the Exchange Act and Rules 17a-3 and 17a-5 thereunder, which require broker-dealers to make and keep current certain books and records and to make certain filings with the SEC (“Order”).²

¹ See the Record (“R.”) that FINRA’s Registration and Disclosure Department compiled and provided to the parties and FINRA’s Office of General Counsel on May 3, 2018 pursuant to FINRA Procedural Rule 9524(a)(3).

² See R. at FINRA00052.

In particular, the SEC found that from September 2015 through July 2016 (the “Relevant Period”), J.H. Darbie failed to properly compute and report its net capital, which resulted in the Firm operating for a period of time with net capital deficiencies that ranged from \$72,103.95 to \$788,714.00.³ The net capital deficiencies arose because: (1) J.H. Darbie had executed trades for its customers through three foreign investment banks, which subjected J.H. Darbie to a \$250,000 minimum net capital requirement instead of \$5,000;⁴ (2) J.H. Darbie received commissions from these foreign banks, which the Firm misclassified as allowable assets instead of non-allowable assets;⁵ and (3) J.H. Darbie failed to accrue for up to \$500,000 in liabilities that arose from a threatened legal action by one of J.H. Darbie’s customers against its clearing firm which J.H. Darbie was contractually obligated to pay.⁶ Due to these accrual errors, misclassifications and other issues, J.H. Darbie filed inaccurate monthly Financial and Operational Combined Uniform Single (“FOCUS”) Reports during the Relevant Period.⁷ On August 5, 2016, J.H. Darbie notified the SEC and FINRA of its net capital deficiencies.⁸

The SEC censured J.H. Darbie, required it to cease and desist from committing or causing any violations and any future violations of Sections 15(c)(3) and 17(a)(1) of the Exchange Act and Rules 15c3-1, 17a-3 and 17a-5 thereunder, and ordered it to pay civil penalties of \$50,000 plus post-Order interest of \$113.⁹ As undertakings, the Firm agreed to retain for no less than three years from the date of the Order a new Financial and Operations Principal (“FINOP”) who is not unacceptable to the SEC staff and also to certify in writing its compliance with these undertakings within sixty days of completion.¹⁰

The SEC also found that Robert Y. Rabinowitz (J.H. Darbie’s majority owner, CEO, and at the time, FINOP) failed to calculate the Firm’s net capital accurately and caused J.H. Darbie’s erroneous net capital calculations, books and records and financial reports.¹¹ The SEC found that Rabinowitz willfully made or caused to be made false statements in reports filed with the SEC and caused the Firm’s violations of Sections 15(c)(3) and 17(a)(1) of the Exchange Act, and Rules 15c3-1, 17a-3 and 17a-5 thereunder.¹² The SEC censured Rabinowitz, ordered him to

³ R. at FINRA00050.

⁴ J.H. Darbie terminated its relationship with the foreign investment banks in July 2016 in order to meet the \$5,000 net capital requirement under Exchange Act Rule 15c3-1(a)(2)(vi). *Id.*

⁵ R. at FINRA00051.

⁶ *Id.* J.H. Darbie was back in net capital compliance on August 16, 2016 when its clearing firm waived the indemnification provision with the right to reinstitute it. *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ R. at FINRA00053.

¹⁰ R. at FINRA00052-FINRA00053.

¹¹ R. at FINRA00052.

cease and desist from committing or causing any future violations of the statutes and rules described above, and ordered him to pay civil penalties of \$25,000 plus post-Order interest of \$56.50.¹³ Finally, the SEC ordered Rabinowitz to refrain from serving as a FINOP for three years from the date of the Order, to re-take and pass the Series 27 examination before resuming duties as a FINOP, and to certify in writing his compliance with these undertakings.¹⁴

III. Background Information

A. The Firm

J.H. Darbie is based in New York, New York and has been a FINRA member since February 1998.¹⁵ According to the Central Registration Depository (“CRD”), the Firm has 2 branch offices, one of which is an Office of Supervisory Jurisdiction (“OSJ”), and employs approximately 41 registered representatives, 17 of whom are registered principals.¹⁶ The Firm does not employ any statutorily disqualified individuals.

J.H. Darbie is approved to engage in the following lines of business: broker or dealer retailing corporate equity securities over-the-counter; broker or dealer selling corporate debt securities; underwriter or selling group participant (corporate securities other than mutual funds); mutual fund retailer; U.S. government securities broker; municipal securities broker; broker or dealer selling variable life insurance or annuities; put and call broker or dealer or option writer; investment advisory services; non-exchange member arranging for transactions in listed securities by exchange member; private placements of securities; and finally, effects transactions in commodity futures, commodities, commodity options as broker for others or dealer for own account.¹⁷

J.H. Darbie is also a member of the Nasdaq Stock Market (“NQX”) and the Municipal Securities Rulemaking Board (“MSRB”).¹⁸

B. FINRA Routine Examinations

Over the past three years, FINRA has examined J.H. Darbie annually. The Firm’s 2018 Cycle Examination resulted in a Cautionary Action for exceptions resulting from the Firm’s

¹² *Id.*

¹³ R. at FINRA00053.

¹⁴ R. at FINRA00052.

¹⁵ CRD Snapshot Report for J. H. Darbie dated April 1, 2019 (“CRD Report”) at 3 (attached as Exhibit 1).

¹⁶ Per information in CRD as of April 1, 2019.

¹⁷ CRD Report at 5; *see also* R. at FINRA00061.

¹⁸ *Supra* note 16.

failure to: maintain written compensation agreements with its registered representatives relating to the payment of commissions; retain documentation relating to expenses paid with cash; maintain option agreements for certain customers; timely update a registered representative's Form U4; did not promptly forward customer checks to its clearing firm or have an adequate supervisory system in place to monitor, detect and prevent instances in which customer checks were not promptly forwarded; and enforce its written supervisory procedures as it related to new hires.¹⁹

FINRA issued the Firm a Cautionary Action following the 2017 Cycle Examination for exceptions resulting from the Firm's failure to: enforce heightened supervisory procedures pursuant to the Firm's written supervisory procedures; promptly and fully complete Form U4 disclosures; have an adequate supervisory system in place pertaining to due diligence for prospective investment banking and private placement transactions; obtain and preserve an account record of all required information; and conduct timely inspections of two OSJ locations.²⁰ Certain exceptions concerning registered representatives who failed to notify the Firm within 30 days after learning of Form U4 reportable events were referred to FINRA's Enforcement Department. That matter is ongoing.

The 2016 Cycle Examination also resulted in a Cautionary Action for the Firm due to exceptions arising from the Firm's failure to: conduct an adequate review of outside business activities for two registered representatives; retain and archive instant messaging communications for three registered representatives; timely notify FINRA of its use of Global Relay as its electronic storage media provider; and to report a written customer complaint pursuant to FINRA Rule 4530.²¹

C. Regulatory Actions

In the past two years, J.H. Darbie has been subject to two disciplinary matters apart from the Order. In March 2018, J.H. Darbie entered into a Letter of Acceptance, Waiver and Consent ("AWC") with FINRA in which FINRA censured the Firm and fined it \$25,000 as well as required certain undertakings.²² FINRA found that, from October 2014 through September 2015, J.H. Darbie failed to supervise the variable annuity recommendations and related retail communications of one of its registered representatives. Specifically, the representative sent numerous retail communications that falsely described variable annuity investments and violated the content standards of FINRA's advertising rules.²³

¹⁹ FINRA Examination Disposition Letter, Examination No. 20180564673, dated December 26, 2018 (attached as Exhibit 2).

²⁰ FINRA Examination Disposition Letter, Examination No. 20170524713, dated April 19, 2018 (exhibits omitted) (attached as Exhibit 3).

²¹ FINRA Examination Disposition Letter, Examination No. 20160476277, dated April 4, 2017 (attached as Exhibit 4).

²² Letter of Acceptance, Waiver and Consent No. 2015043369501 dated April 11, 2018 (attached as Exhibit 5).

²³ *Id.*

In May 2017, J.H. Darbie entered into an AWC in which FINRA censured and fined it \$12,500 due to violations arising from its trading activity.²⁴ FINRA found the Firm transmitted to the Order Audit Trail System (“OATS”) 19 reports between January 5, 2015 and January 16, 2015 that contained inaccurate, incomplete or improperly formatted data. The examination also discovered 16 instances where the Firm failed to submit certain required “route reports” to OATS. Finally, the Firm was not able to provide sufficient documentary evidence that it performed the supervisory procedures as set forth in the Firm’s written supervisory procedures.

D. Prior Rule 19h-1 Notices

No prior 19h-1 notices have been filed on behalf of J.H. Darbie.

IV. The Firm’s Proposed Continued Membership with FINRA and Proposed Supervisory Plan

The Firm seeks to continue its membership in FINRA notwithstanding the Order that caused its statutory disqualification. On June 18, 2018, the Firm certified to the SEC that it had obtained a FINOP not unacceptable to the SEC staff.²⁵ Specifically, on March 29, 2018, the Firm retained Mitchell Bayer as its interim FINOP, and on April 12, 2018, appointed Michael Gallas as its current FINOP.²⁶ In addition, the SEC staff has confirmed to FINRA that the Firm paid its civil penalties as required by the Order.²⁷

In support of its Application, the Firm has agreed to the following plan of supervision (the “Supervisory Plan” or the “Plan”).²⁸

1. Retain documentation evidencing completion of each of the undertakings specified in the Order;
2. Retain documentation on at least a quarterly basis that memorializes who served as the Firm’s FINOP for the preceding period;
3. Provide FINRA with a copy of the certification and all supporting documentation that will be provided to the SEC upon completion of the undertakings as specified in the Order;

²⁴ Letter of Acceptance, Waiver and Consent No. 2015044150301 dated May 24, 2017 (attached as Exhibit 6).

²⁵ See Letter from Erik Anderson, J. H. Darbie & Co, Inc., to Thomas P. Smith, Jr., Securities and Exchange Commission dated June 18, 2018 (referenced exhibits omitted) (attached as Exhibit 7).

²⁶ *Id.*

²⁷ See E-mails from Wm. Smith Greig, Securities and Exchange Commission, to Financial Industry Regulatory Authority dated June 26, 2018 and October 4, 2018 (attached as Exhibit 8). According to the SEC, the Firm made a payment of \$25,000 on March 29, 2018, and payments of \$12,581.50 on May 25, 2018 and on August 29, 2018.

²⁸ See Consent to Supervisory Plan attached as Exhibit 9.

4. Obtain written approval from Member Regulation prior to changing any provision of the Supervisory Plan; and
5. Submit all requested notifications, documents and certifications under this Supervisory Plan directly to:

Lorraine Lee
Manager, Statutory Disqualification Program
FINRA
1735 K Street NW
Washington, DC 20006
Lorraine.Lee@finra.org

V. Discussion

After evaluating this Application, Member Regulation approves the Firm's request to continue its membership with FINRA, subject to the terms and conditions set forth herein. In evaluating J.H. Darbie's Application, Member Regulation assessed whether the Firm has demonstrated that its continued membership is consistent with the public interest and does not create an unreasonable risk of harm to investors or the markets.²⁹ The factors Member Regulation considered in making this assessment include:

- A. The nature and gravity of the disqualifying event;
- B. The length of time that has elapsed since the disqualifying event;
- C. Whether any intervening misconduct has occurred;
- D. The precise nature of the securities-related activities proposed in the Application;
- E. The regulatory history and industry experience of the member firm; and
- F. Any other mitigating or aggravating circumstances that may exist.

While the Order outlined serious violations of the federal securities laws, the Firm represents that it has taken steps to address the conduct that led to the SEC's sanctions. As of the date of this Notice, the Firm represents that it continues to comply with the terms of the Order. J.H. Darbie has retained a FINOP who is not unacceptable to the SEC staff and undertakes to have a similarly qualified FINOP for at least three years from the date of the Order. J.H. Darbie has also paid its civil penalties to the SEC. Member Regulation has reviewed the Firm's regulatory history and recent disciplinary actions and finds nothing that would prevent the continuance of the Firm as a FINRA member at this time.

In addition, J.H. Darbie's proposed Supervisory Plan, which it agreed not to alter without FINRA's prior approval, is reasonably designed to ensure the Firm's continued compliance with the Order's terms. Further, following approval of the Firm's continued membership with

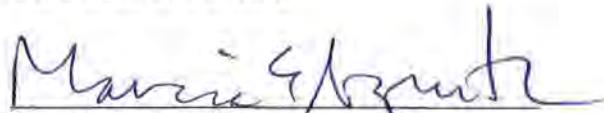
²⁹ See *In the Matter of the Continued Membership of J.P. Morgan Securities, LLC*, FINRA NAC 2014, at 12-13 (citing *Frank Kufrovich*, 55 S.E.C. 616, 624 (2002)) (available at http://www.finra.org/sites/default/files/NAC%20Statutory%20Disqualification%20Decision%20SD1904_0_0_0_0_0_0_0.pdf (last visited Apr. 15, 2019)).

FINRA, FINRA will utilize its examination and surveillance processes to monitor the Firm's compliance with the standards prescribed by Exchange Act Rule 19h-1 and FINRA Rule 9523.

Member Regulation is satisfied that the Firm's continued membership with FINRA does not create an unreasonable risk of harm to the market or investors. Accordingly, Member Regulation approves the Firm's Application to continue its membership with FINRA as set forth herein. The Firm is also registered with the MSRB and the NQX, which concur with FINRA's approval of the Firm's proposed continued membership.

In conformity with the provisions of Rule 19h-1 of the Exchange Act, the continued membership of the Firm will become effective within 30 days of the receipt of this Notice by the Commission, unless otherwise notified by the SEC.

On Behalf of FINRA,

A handwritten signature in blue ink, appearing to read "Marcia E. Asquith".

Marcia E. Asquith
Executive Vice President and Corporate Secretary

Exhibits

1. CRD Snapshot Report for J. H. Darbie & Co., Inc.
2. FINRA Examination Disposition Letter, Examination No. 20180564673, dated December 26, 2018.
3. FINRA Examination Disposition Letter, Examination No. 20170524713, dated April 19, 2018 (exhibits omitted).
4. FINRA Examination Disposition Letter, Examination No. 20160476277, dated April 4, 2017.
5. Letter of Acceptance, Waiver and Consent (No. 2015043369501) dated April 11, 2018.
6. Letter of Acceptance, Waiver and Consent (No. 2015044150301) dated May 24, 2017.
7. Letter from Erik Anderson, Chief Compliance Officer, J. H. Darbie & Co., Inc. to Thomas P. Smith, Jr., Assistant Regional Director, U.S. Securities and Exchange Commission, dated June 18, 2018.
8. E-mails from Wm. Smith Greig, SEC to FINRA (June 26, 2018 and October 4, 2018).
9. Consent to Supervisory Plan for Membership Continuance Application dated November 30, 2018.