

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of the Association

of

X

with

The Sponsoring Firm

as a

General Securities Representative

Redacted Decision

Notice Pursuant to

Section 19(d)

Securities Exchange Act

of 1934

SD Decision No. 02002

On August 16, 2001, the Sponsoring Firm completed a Membership Continuance Application ("MC-400" or "the Application") requesting permission for the Firm to continue its NASD membership if it permitted X¹ to be associated with it as a general securities representative. In January 2002, a Hearing Panel of the Statutory Disqualification Committee of NASD Regulation held a hearing on the matter. X appeared, accompanied by his proposed supervisor, the Firm's President and Chief Executive Officer.

A. The Statutorily Disqualifying Event

In 2001, X pled guilty in a County Circuit Court, State 1, to the felony offense of operating a motor vehicle under the influence of alcohol ("DUI").² The court sentenced X to perform 60 days of community service, serve 120 days in the County work release facility, serve

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 This was X's third DUI offense, which rendered it a felony under State 1 law. The prior offenses occurred in 1999 and 1992.

four months on "tether,"³ serve 20 months' probation (until 2002), and participate in an alcoholism treatment program.

B. Background Information

1. X

X became a general securities representative in July 1991. X has no record of any formal or informal regulatory actions taken against him. Three customer complaints have been filed against him during his 10 years in the industry. Two of those complaints were rescinded and the third involved a client whose claims were never substantiated. NASD Regulation did not take action with regard to the third complaint.⁴

X is also licensed as an insurance representative in State 1. The State 1 Department of Insurance has no record of any regulatory action or customer complaints against X.

X filed for Chapter 13 bankruptcy protection in July 1995. He represents that he pursued this action because he had endured an extended period of unemployment.⁵ X was discharged of all debts in January 1999.

2. The Firm

The Sponsoring Firm has been a member of the NASD since April 1998. The Firm is engaged in a general securities business. It has 12 offices of supervisory jurisdiction ("OSJs") and 14 branch offices. The Sponsoring Firm employs 13 unregistered persons, 25 registered principals, and 108 registered representatives.

The Firm has no record of any formal regulatory action taken against it. In 2001, NASD Regulation issued a Letter of Caution ("LOC") to the Sponsoring Firm's home office in State 2.

³ "Tether" is the term used in the State 1 judicial system to refer to ankle or wrist surveillance. While X served tether, he was permitted to leave his home on a scheduled basis to perform volunteer work and run personal errands.

⁴ Both X and his firm at the time denied the allegations of the customer's complaint.

⁵ X reported on an amended Uniform Application for Securities Industry Registration or Transfer ("Form U-4") that when he left a previous firm in May 1994, a customer complaint was pending. The previous firm included that customer complaint on his Uniform Termination Notice for Securities Industry Registration ("Form U-5") and that report caused another firm to rescind the job offer that it had previously extended to him. X also represented at the hearing that he was unable to obtain another job offer until the customer withdrew the complaint.

Later in 2001, the Firm responded to the LOC, stating that all of the noted deficiencies had been addressed.

In 2002, NASD Regulation notified the Sponsoring Firm that it met one of the criteria set forth in NASD Rule 3010(b)(2) ("the Taping Rule") and was subject to the Taping Rule's provisions. The Taping Rule takes effect "whenever a specified percentage of a member firm's sales force is comprised of registered persons who were employed within the last three years by a firm that has been expelled from membership in a securities industry self-regulatory organization or has had its registration as a broker/dealer revoked by the SEC."⁶ Pursuant to the requirements of the Taping Rule, the Sponsoring Firm must establish, maintain, and enforce special written procedures for supervising the telemarketing activities of its registered persons and install a taping system within 30 days of the 2002 notification.⁷

C. Proposed Business Activities and Supervision

The Sponsoring Firm proposes to employ X as a general securities representative, who will work out of his home in State 1. The OSJ that will have jurisdiction over X is the Firm's home office, located in State 2. The Proposed Supervisor, the Firm's President and CEO, is based in the State 2 office, and he proposes to be X's supervisor.

The Proposed Supervisor has been employed in the securities industry since 1990. He became a general securities representative in July 1991 and a general securities principal in January 1992. The Proposed Supervisor has been employed by the Sponsoring Firm since its inception in January 1998.

The Proposed Supervisor has no formal or informal regulatory history. Two customers filed complaints against the Proposed Supervisor for activities that occurred when he was employed by a previous firm. The first complaint was settled for \$25,000; the Proposed Supervisor did not contribute to this settlement. The second complaint was withdrawn with prejudice.

D. Member Regulation Recommendation

Member Regulation recommends that X be permitted to associate with the Sponsoring Firm as a general securities representative, supervised by the Proposed Supervisor and subject to certain specified supervisory terms and conditions.

⁶ See NASD Notice to Members 98-52 ("SEC Approves Taping Rule") (July 1998).

⁷ The Proposed Supervisor has filed an application on behalf of the Sponsoring Firm for an exemption from the requirements of the Taping Rule. The application is pending.

E. Discussion

After careful review of the entire record in this matter, we have determined to deny the Sponsoring Firm's Application for X to become associated as a general securities representative. We find that it would not be in the public interest to permit X to engage in the securities business at this time and that his employment in the industry may create an unreasonable risk of harm to the market or investors.

In reaching our determination, we have considered and evaluated this Application based upon the felony involved and the totality of the circumstances.⁸ We find that X's driving under the influence of alcohol conviction is a very serious matter, and it is exacerbated by the fact that he is a repeat offender. Prior to the 2001 guilty plea which led to X's recent felony conviction, he had been convicted of driving under the influence in 1999 and in 1992. This record shows that X has been struggling with his alcoholism for nearly a decade and leads us to conclude that his failure to take action to treat his problem until his third conviction demonstrates poor judgment. Further, the conviction at issue occurred only one year ago, which is a short duration when compared to X's history of substance abuse. We are thus unable to find that sufficient time has elapsed to enable X to demonstrate that he has the judgment and ability to handle the responsibility necessary for employment in the securities industry. X's criminal record causes us to question whether he will act in a trustworthy and responsible manner in dealing with the investing public.

We also conclude that the recency of X's conviction and the pendency of his probationary period militate against allowing his re-entry into the securities industry at this time. In our view, X has not demonstrated that he has rehabilitated himself during the short period that has elapsed since his felony conviction. Further, we note that the remedial probationary program imposed by the court does not end until late 2002.

Additionally, we find that the Firm has not proposed an adequate plan to provide the necessary supervision for X. The Sponsoring Firm's main office, where the Proposed Supervisor is located, is in State 2. Under the proposed plan, X would be located hundreds of miles away in State 1, operating out of his home with no other employees on site. We have considered the Firm's proposal for the Proposed Supervisor to conduct weekly videoconferences with X, but even considering that factor, we conclude that the Firm's supervision of X would not qualify as sufficiently heightened supervision. X is a statutorily disqualified person who has demonstrated a tendency toward bad judgment. For these reasons, we conclude that under the proffered supervisory plan, the Sponsoring Firm is unable to provide the required heightened level of

⁸ See Frank Kufrovich, Exchange Act Rel. No. 45437 (Feb. 13, 2002) (upholding NASD Regulation's denial of a statutory disqualification applicant who had committed non-securities-related felonies "based upon the totality of the circumstances" and NASD Regulation's explanation of the bases for its conclusion).

supervision necessary to assure us that it will effectively prevent and detect possible misconduct on the part of X.⁹

The nature, seriousness, and recency of X's conviction and the inadequate supervisory structure proposed by the Firm lead us to conclude that, in light of the circumstances, X's re-entry into the securities industry at this time would create an unreasonable risk of harm to the market or investors. Accordingly, we deny the Sponsoring Firm's Application to employ X.

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President and
Corporate Secretary

⁹ Additionally, we are concerned with the Sponsoring Firm's ability to supervise properly X's return to the industry. The Sponsoring Firm is a relatively young firm, and it has grown rapidly since its inception in 1998. It recently became subject to the requirements of the Taping Rule, and if it is unsuccessful in its request for an exemption, it will have to abide by the stringent terms of that rule. Taking on the additional task of supervising a statutorily disqualified person would represent yet another enhanced supervisory requirement for this relatively young Firm to meet.