

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of the Association

of

X

as a

General Securities Representative

with

The Sponsoring Firm

Redacted Decision

Notice Pursuant to
Section 19(d)
Securities Exchange Act
of 1934

SD00002

On September 23, 1999, a member firm ("the Sponsoring Firm" or "the Firm") submitted an MC-400 application ("Application") to NASD Regulation, Inc. ("NASD Regulation") to permit X¹, a person subject to a statutory disqualification, to continue to associate with the Firm as a general securities representative. In December 1999, a subcommittee of the Statutory Disqualification Committee of NASD Regulation held a hearing on the matter. X appeared and was accompanied by his attorney. Also appearing at the hearing were the Sponsoring Firm's President and Chief Executive Officer, the General Counsel, and X's proposed supervisor ("the Proposed Supervisor") at the Firm. In addition, BA appeared on behalf of the Department of Member Regulation ("Member Regulation") of NASD Regulation.

X's Background

X is subject to a statutory disqualification as a result of his entering into a plea agreement, in 1999, with a State District Attorney's Office, pursuant to which he pleaded guilty in a United States District Court to two counts of a five-count indictment for conspiracy to defraud the United States and making false statements to the Federal Deposit Insurance

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.

Corporation ("FDIC").² In 1999, X was sentenced to three years of probation, six months of which were to be served under restricted home detention with electronic monitoring. X was also fined \$20,000 as part of the sentence.

X has been registered with the Sponsoring Firm as a general securities representative and financial and operations principal since 1993. Prior to joining the Sponsoring Firm, he worked at Bank A (where the statutory disqualifying events took place)³ from 1977 to 1992. In 1996, in connection with the events that led to his statutory disqualification, X consented to an order by the FDIC prohibiting his return to the banking industry without the FDIC's prior approval. Member Regulation represented that it was not aware of any other regulatory actions having been taken against X in any capacity.

Background of the Sponsoring Firm

According to the Application and related documents, the Sponsoring Firm has one office of supervisory jurisdiction and no branch offices. It employs 15 registered principals and 69 registered representatives. The Firm indicated that it became a member of the NASD in 1976. It is primarily engaged in the business of institutional fixed income sales, but also services some high net worth, full service retail accounts. The Sponsoring Firm makes markets in approximately 15 equity securities. With regard to its retail business, the Firm is a fully disclosed introducing broker through its clearing broker, Firm B.

² The first count of the indictment to which X pleaded guilty was for conspiracy to defraud the United States, in violation of 18 U.S.C. § 371. This count alleged that, as executive vice president of Bank A, a financial institution, X conspired from 1989 to 1991 to make false entries in the books, reports and statements of Bank A with the intent to injure, defraud and deceive. The principal object of the conspiracy, according to the indictment, was to deceive the FDIC into believing that Bank A was financially stronger than it actually was by causing the books to falsely represent that certain "recourse" loans had been sold "without recourse." By causing these false statements to be entered into Bank A's records, X caused Bank A to submit inaccurate financial information to the FDIC that misrepresented Bank A's financial condition. The indictment alleged further that X instructed a co-conspirator to remove evidence from Bank A that indicated that the loans were sold "with recourse" prior to an FDIC examination, thereby deliberately concealing the evidence from the examiners.

The second count of the indictment to which X pleaded guilty alleged that X made or caused to be made a false statement to the FDIC, in violation of 18 U.S.C. § 1007. The indictment alleged that, as executive vice president of Bank A, X knowingly made and invited reliance on a false statement by stating on a questionnaire to the FDIC that Bank A had no liabilities when in fact X knew that Bank A had the recourse loans as contingent liabilities.

³ See supra note 2 and accompanying text.

In 1998, after performing a routine examination of the Firm, NASD Regulation issued the Sponsoring Firm a letter of caution for failing to compute accurately its net capital and for failing to accept promptly transactions in the automated confirmation transaction system. NASD Regulation has conducted five "cause" examinations of the Firm in the past two years. Two of these examinations, which were related to customer complaints, were filed without action ("FWA"). The other three examinations were to review terminations for cause. Two of these were FWA, and the other is in its initial stages of investigation. One of the Sponsoring Firm's registered representatives is currently the subject of a civil action brought by the Securities and Exchange Commission ("SEC") alleging insider trading.

The Sponsoring Firm does not employ any statutorily disqualified individuals and is not a member of any other self-regulatory organization. Member Regulation stated that it was not aware of any other complaints, disciplinary proceedings, or arbitrations against the Sponsoring Firm.

Background of Proposed Supervisor

The Sponsoring Firm proposes to have the Sales Manager be X's direct supervisor at the Firm. The Proposed Supervisor has been registered with the Sponsoring Firm since 1991, and he acts as the sales manager at the Firm. The Proposed Supervisor passed the Series 7 examination in 1977 and the Series 24 examination in 1990. He has no disciplinary history.

Member Regulation's Recommendation

Member Regulation recommends that X's association with the Sponsoring Firm be denied. Member Regulation's determination is based on the serious nature of the misconduct, which was related to a financial institution, and the fact that X has only recently been placed on probation for three years for his crimes.

Discussion

After a careful review of the entire record in this matter, we find that the Sponsoring Firm's Application to continue to employ X as a general securities representative should be denied. X was convicted of serious crimes. These crimes include conspiracy "to make and cause to be made false entries in books, reports, and statements of [Bank A] . . . with the intent to injure and defraud [Bank A] and to deceive officers of [Bank A] and of the FDIC" and, "for the purpose of influencing the action of the FDIC in its role of regulating and auditing [Bank A], knowingly [making] and [inviting] reliance on a false statement." Moreover, X actively and intentionally concealed his fraudulent behavior from federal regulators. The fact that these crimes did not involve securities offers little solace. As the SEC has emphasized, "[D]eliberate deception practiced on a regulatory authority reflects strongly on the perpetrator's fitness to work in the securities industry in any capacity." In re Funding Capital Corp., 50 S.E.C. 603, 605 (1991). See also In re Halpert and Co., 50 S.E.C. 420, 422 (1990) ("The fact that

Tuchman's misconduct did not occur in the securities business does not weigh in his favor. On the contrary, a criminal conviction involving fraud raises a serious question as to whether the perpetrator will engage in similar misconduct in the securities industry, a field that is rife with opportunities for abuse.").

The recency of both the conviction and the imposition of a three-year probation period also militates against allowing X to continue his association with the Sponsoring Firm. Indeed, the length of time that has elapsed since the registered representative's conviction and whether the registered representative remains on probation are factors that appropriately have been given considerable weight in past cases. See, e.g., In re William J. Haberman, Exchange Act Rel. No. 40673 (Nov. 12, 1998) (considering six-year-old conviction to be both recent and supportive of the NASD's determination that registered representative's association with member was not in the public interest), aff'd, Haberman v. SEC, No. 99-1014, 2000 U.S. App. LEXIS 645 (8th Cir. Jan. 19, 2000); Funding Capital Corp., 50 S.E.C. at 606 ("We share the NASD's concern that [Kilbourn] remains on probation. . . .").⁴ As discussed above, the District Court entered judgment against X in September 1999, and imposed a three-year-probation period at that time. Under these circumstances, denial of the Application would be consistent with the public interest and the protection of investors.

Accordingly, we deny the Sponsoring Firm's Application to employ X as a general securities representative.

On Behalf of the National Adjudicatory Council,

Joan C. Conley
Senior Vice President and Corporate Secretary

⁴ See also In re Adrian Antoniu, 48 S.E.C. 909, 912 (1987) (noting that the SEC had previously reversed an NASD decision that would have permitted Antoniu to work for an NASD member because of "the short period that [had then] elapsed since Antoniu's judgment of conviction . . . , and the fact that [at that time] Antoniu [was going to] remain on probation for approximately one more year."), rev'd on other grounds, Antoniou v. SEC, 877 F.2d 721 (8th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); In re Chapman Secs., Inc., Exchange Act Rel. No. 33092 (Oct. 22, 1993) (denying permission for individual's association with firm where he had recently been convicted of and placed on probation for defrauding financial institution by making false financial statements); cf. In re American Inv. Group of New York, LP, Exchange Act Rel. No. 29425 (July 10, 1991) (directing Chicago Stock Exchange to bar individual from becoming associated with its member firm, in part, because of the short period of time that had elapsed since the conviction and because the individual was still on probation).