

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

SD99018

On December 15, 1998, a member firm ("the Sponsoring Firm" or "the Firm")¹ submitted an MC-400 application ("Application") to permit X² a person subject to a statutory disqualification, to associate with the Firm as a general securities representative. In April 1999, a subcommittee of the Statutory Disqualification Committee of NASD Regulation, Inc. ("NASD Regulation") held a hearing on the matter.³ X appeared and was accompanied by the proposed supervisor for X at the Sponsoring Firm ("the Proposed Supervisor")⁴, and the Firm's Chief Compliance Officer. BA appeared on behalf of the Department of Member Regulation ("Member Regulation").

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 Various documents included in the current record list X as "[name redacted]" or "[name redacted]." X explained that he had previously used the name [name redacted], but that he currently is known as X.

³ The parties waived the 10-day notice provision for service of exhibit and witness lists.

⁴ We note that X and the Proposed Supervisor are not related by blood or marriage.

X's Background

X is subject to a statutory disqualification as a result of his 1991 guilty plea in a state court, to robbery in the second degree. The conviction resulted from an incident in 1991, when X forcibly stole property (a sum of money) from another individual (with the help of a third party).⁵ X was sentenced to a term of five years' probation. X's probation was terminated early in September 1995.

X was a "trainee" in the securities industry at three firms between April and October 1995. He then became an "assistant" at six other firms, and began working at the Sponsoring Firm in 1998. X was employed by the Sponsoring Firm until early 1999, at which time the Firm terminated his employment after being informed by Member Regulation that X could not be associated with the Firm unless and until the MC-400 application was granted. X passed the Series 7 examination in 1996.

Background of the Sponsoring Firm

The Sponsoring Firm has been a member of the NASD since 1987.⁶ The Firm has 21 offices of supervisory jurisdiction and 21 branch offices.⁷ The Firm employs 35 general securities principals and 212 registered representatives. It engages in the investment business, concentrating in stocks, mutual funds, bonds and investment banking. The Firm employs no other individuals who are subject to statutory disqualification.

The Sponsoring Firm has been the subject of numerous regulatory actions, by NASD Regulation as well as by various states. Each action will be discussed separately below. A number of these regulatory actions culminated in the Sponsoring Firm's entering into Letters of Acceptance, Waiver and Consent ("AWC") with NASD Regulation.

NASD Regulation Actions Against the Sponsoring Firm. In 1999, NASD Regulation accepted an AWC finding that the Sponsoring Firm failed, in five instances, contemporaneously to execute customer limit orders after it traded each subject security for its own account at a price that would have satisfied each such customer limit order, in violation of Conduct Rules 2110 and IM-2110-2; reported, in 10 instances, transactions to the Automated Confirmation Transaction service ("ACT") and designated its capacity as principal when it was actually acting as agent, in violation of NASD Marketplace Rule 6130; and failed to establish, maintain and enforce written supervisory procedures regarding ACT compliance, best execution, books and records, limit order protection, SOES order

⁵ Although X stated in a letter to NASD Regulation staff, dated April 8, 1999, that the incident occurred in 1989 and testified during the hearing before the subcommittee that the incident occurred either in 1989 or 1990, the indictment and an affidavit by one of the investigating detectives indicated that the incident took place in January 1991.

⁶ The Sponsoring Firm is not a member of any other self-regulatory organization.

⁷ X would work at one of the Sponsoring Firm's branch office located in Florida.

eligibility, order handling, registration of trading personnel, trade reporting, mark-ups/mark-downs, locked and crossed markets, and certain anti-competitive issues enumerated in the Securities and Exchange Commission's 21(a) Report, in violation of NASD Conduct Rules 2110 and 3010. The Sponsoring Firm was fined \$27,000.

In 1998, NASD Regulation accepted an AWC finding that the Sponsoring Firm failed to report to ACT, in one transaction, the correct price for a Nasdaq Small Cap security, in violation of NASD Marketplace Rule 4642(d); failed to report to ACT the contra side executing broker in seven transactions in eligible securities, in violation of NASD Marketplace Rule 6130(d); failed to show the correct time of execution on five memoranda of brokerage orders, in violation of SEC Rule 17a-3(a)(6) and NASD Conduct Rule 3110; on five occasions, failed to provide written notification to each of its customers that it was a market maker when it acted as principal for its own account, in violation of SEC Rule 10b-10; failed, on three occasions, contemporaneously to execute customer limit orders after it traded for its own market maker account at prices equal to or better than such customer limit orders, in violation of NASD Conduct Rule 2110 and IM-2110-2; failed to report to ACT the correct symbol indicating whether seven transactions in eligible securities were buys, sells, sell shorts, sell shorts exempt or crosses; and failed to establish, maintain and enforce written supervisory procedures reasonably designed to achieve compliance with the applicable securities laws and regulations regarding trade reporting, record keeping, the limit order protection interpretation, the registration of persons with the NASD, and short sales, in violation of NASD Conduct Rules 2110 and 3010. The Sponsoring Firm was censured, fined \$19,000 and required to hire an independent consultant.

In 1997, NASD Regulation accepted an AWC finding that the Sponsoring Firm failed to notify NASD Regulation of secured demand note deficiencies; failed to make accurate net capital computations; effected sales of stock at unfair prices; failed to maintain memoranda of principal purchases and sales of stock with retail customers and broker/dealers; and failed to maintain and preserve confirmations of customer transactions. The Sponsoring Firm was censured, fined \$15,000, and ordered to pay restitution to certain customers.

In 1993, NASD Regulation accepted an AWC finding that the Sponsoring Firm, through an associated person, effected 57 sales of common stock by using misleading promotional materials. The Sponsoring Firm was censured and fined \$10,000.

State Actions Against the Sponsoring Firm. In 1996, State 1 entered a Summary Order of Prohibition against the Sponsoring Firm based on one of the Firm's associated person's having offered securities to a State 1 resident without being licensed as a securities agent in that state. In 1995, the Firm entered into a consent order with State 2 based on allegations that the Firm failed to disclose a censure and fine imposed by the NASD. State 2 fined the Sponsoring Firm \$3,000 and placed it on conditional registration for one year. The Sponsoring Firm entered into a Consent Order Settlement with State 3 in 1995 as a result of allegations that the Firm transacted business as an unregistered broker/dealer, employed a sales representative who was not properly registered, and failed to supervise the representative reasonably. State 3 ordered the Sponsoring Firm to pay a \$1,000 administrative penalty and \$500 in costs. In 1994, the Sponsoring Firm entered into a consent order with State 4

based on allegations that the Firm failed to disclose a previous consent order entered against it. As a result of the consent order with State 4, the Sponsoring Firm withdrew its broker/dealer application with that state and agreed not to reapply for two years. In addition, the Sponsoring Firm was fined \$2,000 and assessed costs of \$1,000. Finally, the Sponsoring Firm entered into a settlement with State 5 in 1993 stemming from allegations that the Sponsoring Firm violated certain State 5 supervision provisions in connection with the supervision of one of its associated persons. Pursuant to the settlement with State 5, the Sponsoring Firm had to pay \$1,000 in costs and had to cooperate fully in the prosecution of the associated person.

Background of Proposed Supervisor

The Sponsoring Firm proposes to have the Branch Manager be X's direct supervisor. The Proposed Supervisor has been registered with the Sponsoring Firm since 1996 as both a registered representative and a general securities principal.⁸ The Proposed Supervisor acts as the branch manager for one of the Firm's branch offices. The Proposed Supervisor passed the Series 7 examination in 1989 and the Series 24 examination in 1996. He has no disciplinary history.⁹

Member Regulation's Recommendation

Member Regulation recommended that X's association with the Sponsoring Firm be approved. While noting that the conduct giving rise to X's disqualification was serious, Member Regulation believed that several mitigating factors militated in favor of recommending approval of the application, including as follows: X's conviction occurred more than eight years earlier when he was 19 years old; he has been working with a number of securities firms as an assistant and trainee for years without incident; he has taken several steps evidencing an intent to rehabilitate himself; and he was forthcoming about the incident leading to his statutory disqualification. Member Regulation also stated that none of the Sponsoring Firm's deficiencies discussed above bore directly on the Firm's ability to effectively supervise X.

Discussion

After a careful review of the entire record in this matter, we find that the Sponsoring Firm's Application to employ X as a general securities representative should be denied. Although we are in general accord with Member Regulation's observation that X appears to have made impressive strides at turning his life in a more positive direction and has successfully distanced himself from the incident that

⁸ Prior to his employment with the Sponsoring Firm, the Proposed Supervisor worked at Firm A from 1989 to 1992, and at Firm B, from 1992 to 1996.

⁹ Two arbitrations were filed against the Proposed Supervisor in 1997, but both were dismissed as to him.

gave rise to the statutory disqualification,¹⁰ such observations alone are not enough to tip the scales in favor of granting the Application.

The Sponsoring Firm's disciplinary history seriously calls into question the Firm's ability to supervise adequately a person who, like X, is subject to a statutory disqualification. In this regard, we note that the Firm's disciplinary history includes a number of instances in which the Firm's compliance with certain supervisory requirements was shown to be lacking. In fact, the AWC accepted by NASD Regulation in 1999 included an allegation that the Firm failed to establish, maintain and enforce various supervisory procedures. Moreover, the Firm's Compliance Officer acknowledged during the hearing on this matter that the Firm's branch office, where X would be employed, had exhibited a number of compliance problems in the past. While the Compliance Officer has taken steps to rectify the Firm's past compliance deficiencies, we are not convinced that the Firm is presently capable of properly supervising a person subject to a statutory disqualification. In light of the Sponsoring Firm's fairly lengthy and serious disciplinary history, denial of the application would be consistent with the public interest and the protection of investors.

Accordingly, we conclude that the Sponsoring Firm's Application to employ X as a general securities representative should be denied.

On Behalf of the National Adjudicatory Council,

Joan C. Conley
Senior Vice President and Corporate Secretary

¹⁰ We recognize that X was convicted of a serious crime. The second count of the indictment for robbery in the second degree, to which X pleaded guilty, charged that "on or about [date redacted] 1991, [X] forcibly stole property consisting of a sum of U.S. currency and other personal property from" an individual with the aid of a third party. When asked for an explanation of this incident, X stated that he was present when an acquaintance attempted to collect a debt, and recognizes that he used bad judgement in being present during the event in question. He also acknowledged the validity of his guilty plea. X's probation period was terminated early due to good behavior and he has worked for a number of member firms from 1995 to 1999 without incident.