

**PLEASE NOTE THE LATER CASE HISTORY OF THIS DECISION FOLLOWING
THE TEXT OF THE DECISION.**

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD REGULATION, INC.

In the Matter of
the Association

of

X

as an
Investment Company and
Variable Contracts Products Representative

with

The Sponsoring Firm

Redacted Decision

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

Decision No. SD99023

On November 30, 1998, a member firm ("the Sponsoring Firm" or "the Firm") submitted an MC-400 application ("Application") to permit X¹, a person subject to a statutory disqualification, to associate with the Firm as an investment company and variable contracts products representative. In June 1999, a subcommittee of the Statutory Disqualification Committee ("SD Committee") of NASD Regulation, Inc. ("NASD Regulation") held a hearing on the matter. X appeared and was accompanied by a principal with the Sponsoring Firm and Director of Brokerage Services, and by a principal at the Sponsoring Firm and the proposed supervisor of X ("Proposed Supervisor"). BA appeared on behalf of NASD Regulations Department of Member Regulation ("Member Regulation").

X is subject to a statutory disqualification pursuant to Section 3(a)(39)(F) of the Securities Exchange Act of 1934 and Article III, Section 4(a) of the NASD By-Laws, due to an NASD order barring him from being associated in any capacity with any member of the Association. In 1982, X signed an Offer of Settlement and consented to findings that he had recommended purchases of unregistered securities totaling in excess of \$1,300,000 to public customers, in violation of Article III, Section 1 of the Rules of Fair Practice (now Conduct Rule 2110), and that

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.

he had effected the transactions without prior written notification to his employer, in violation of Article III, Section 1 of the Rules of Fair Practice (now Conduct Rule 3040). As part of the Offer of Settlement, X consented to the NASD's imposition of a censure and a bar. The bar became effective in 1983.

X became registered with the NASD in 1970 as a general securities representative and as a general securities principal in 1971. He has been a life insurance agent since 1981. In 1989, another member firm sought to sponsor X's association as a registered representative. At the time, X was subject to two statutory disqualifications: the 1983 NASD bar, and a 1981 criminal conviction in Ohio for selling the unregistered securities that were the subject of the NASD's complaint and the Offer of Settlement.² The Board of Governors rejected the application.

The Sponsoring Firm. The Sponsoring Firm, the applicant now before us, requests approval to employ X as an investment company and variable contracts products representative. The Sponsoring Firm became a member firm in 1989, and it sells mutual funds and variable products and engages in a general securities business.

The Sponsoring Firm has two offices of supervisory jurisdiction and 16 branch offices. It employs eight general securities principals, 82 registered representatives, and 50 non-registered employees. In March 1999, following a routine examination, the Firm was issued a Letter of Caution for deficiencies with respect to certain supervisory procedures, net capital and recordkeeping violations, and continuing education violations. In March 1999, the Firm responded that the deficiencies had been corrected. The Firm employs no statutorily disqualified individuals.

The Sponsoring Firm proposes to employ X as an investment company and variable contracts products representative in a branch office. The Firm represents that X's business activities would be limited to selling mutual funds and variable products in order to expand the range of products that he might offer to his insurance clients. He would be compensated on a commission basis.

² In 1981, X was criminally convicted for selling unregistered securities to the public. He received a five-year suspended sentence on each count of the indictment and was ordered to pay \$98,000 in restitution. In 1984, a Court of Appeals upheld the criminal conviction but overturned the order of restitution. X nevertheless voluntarily paid \$10,000 in restitution. This criminal conviction, however, is no longer considered a statutorily disqualifying event under Section 3(a)(39)(F) of the Securities Exchange Act of 1934 and Article III, Section 4(g) of the NASD By-Laws, which only apply to felony convictions within 10 years preceding the filing of an application to become associated with an NASD member.

The Sponsoring Firm proposes that the Director of Brokerage Services would be responsible for X's supervision. The Proposed Supervisor has been a general securities principal since 1989 and has worked for the Sponsoring Firm since September 1998. She has no disciplinary history and has been in the business of selling insurance for 24 years.

Member Regulation recommends that X's association with the Sponsoring Firm be denied. In making this recommendation, Member Regulation asserts that the conduct underlying X's disqualification was serious and resulted in substantial customer losses. Member Regulation also notes that the NASD's intention at the time the bar was imposed was permanently to preclude X from associating in any manner with any member firm.

Discussion

After a careful review of the entire record in this matter, we agree with Member Regulation that the Application should be denied. X consented to the imposition of a bar as a sanction for selling unregistered securities and for engaging in private securities transactions without the requisite prior notice to his employer. Bars are intended to prohibit completely a person's ability to engage in any future securities business with any member firm, thus precluding re-entry into the industry absent extremely unusual circumstances. We note that the Securities and Exchange Commission ("SEC" or "Commission") is in accord with our position, and that with respect to SEC bars, the Commission has stated:

[The] imposition of an unqualified bar evidences the Commission's conclusion at the public interest is served by permanently excluding the barred person from the securities industry. Accordingly, absent extraordinary circumstances, a person subject to an unqualified bar will be unable to establish that it is in the public interest to permit reentry to the securities industry.

See Letter of September 13, 1994, from SEC to Joseph R. Hardiman, Pres., NASD, Inc.

We find that X's NASD bar is a statutory disqualification and that he should not be permitted re-entry into the securities industry. We also find that there are no extraordinary circumstances here that would lead us to conclude that X should be permitted re-entry into the industry.

At the hearing, the Sponsoring Firm entered into the record a June 18, 1999 letter from the Firm with attached exhibits, which outlined additional information uncovered by the Sponsoring Firm during its "due diligence" investigation of X and the circumstances surrounding his statutory disqualification. The Sponsoring Firm argued that the documentation indicated that the corporation that structured the unregistered offering had advised X's attorney, and certain individuals who were employed by the broker/dealer with which X was associated, that the

offering complied with state law. The Firm also submitted documentation which purportedly suggested that X had been unable to accept an initial, lower NASD offer of settlement because he was bankrupt, and that the NASD sanctions imposed on five other registered representatives who apparently also engaged in the selling of the unregistered securities did not include bars.

While we are impressed with the Sponsoring Firm's efforts to investigate fully and responsibly the facts surrounding X's statutory disqualification, arguments raised by this documentation are tantamount to a collateral attack on X's statutory disqualification. Applicant was advised at the hearing, both in the opening statement and by the hearing panelists, that no testimony or evidence seeking collaterally to attack the findings that resulted in the statutory disqualification would be considered. We have always maintained, as has the Commission, that such collateral attacks are not properly considered in these eligibility proceedings. See In re Jan Biesiadecki, Exchange Act Rel. No. 39113 (Sept. 22, 1997) (finding that the "doctrine of collateral estoppel and the NASD's By-Laws limited [the statutorily-disqualified individual's] right to present evidence with respect to the [disqualification]"); see also In re Michael B. Scheft, 48 S.E.C. 710, 712 (1987).

We are likewise impressed that the Sponsoring Firm has, on its own, suggested additional layers of proposed supervision of X. We also have considered the Firm's arguments that X has not been the subject of any disciplinary or other regulatory actions since his 1983 NASD bar, and that neither the Sponsoring Firm nor the Proposed Supervisor has any formal disciplinary history. These facts, however, do not overcome X's unqualified bar from the industry, which we consider to be a serious sanction that necessarily reflects serious misconduct. X also was criminally convicted for this conduct. If we were to permit X to re-enter the industry, absent extraordinary circumstances, we would effectively be overturning the bar and diluting its impact as a substantial sanction imposed for serious violations of the securities laws.

For these reasons, given proper regard for the public interest and the protection of investors, we find that it is not appropriate for X to be associated as an investment company and variable contracts products representative with the Sponsoring Firm.

On Behalf of the National Adjudicatory Council,

Joan C. Conley, Senior Vice President and Corporate Secretary

LATER CASE HISTORY:

X subsequently appealed this decision to the SEC. The SEC dismissed the appeal as abandoned for X's failure to file a brief. Accordingly, the NAC decision is the final decision in this matter.