

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

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of the Continued 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

SD Decision No. 04005

On January 22, 2003, the Sponsoring Firm¹ (or "the Firm") completed a Membership Continuance Application ("MC-400" or "the Application") seeking to permit X, a person subject to a statutory disqualification, to continue to associate with the Sponsoring Firm as a general securities representative. In November 2003, a subcommittee ("Hearing Panel") of NASD's Statutory Disqualification Committee held a hearing on the matter. X appeared, accompanied by his counsel and his Proposed Supervisor. X was also accompanied by Employee 1 and Employee 2, who are employed by the Court Intervention Project and who testified as to X's rehabilitative efforts. LL appeared on behalf of NASD's Department of Member Regulation ("Member Regulation").

A. X's Statutorily Disqualifying Event

X is subject to a statutory disqualification because in August 2002, he pled guilty in a State 1 state court to the felony offense of operating a motor vehicle while under the influence of alcohol ("DUI"), and to the misdemeanor offense of aggravated, unlicensed operation of a motor vehicle. The DUI conviction is a felony because it was X's third DUI offense: he was previously convicted in May 2000 and March 2001. For his most recent conviction, X was assessed a

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.

\$1,000 fine and was sentenced to 12 consecutive weekends in jail, placed on probation for five years, and had his driver's license revoked for one year.²

B. Background Information

1. X

X was first registered in the securities industry in September 1998 as a general securities representative (Series 7). He also qualified as a uniform securities agent (Series 63) in October 1998.

In June 2000, a previous employer (Firm # 1) terminated X's employment. The Uniform Termination Notice for Securities Industry Registration ("Form U5") filed by the previous employer states that X was "permitted to resign," and that a customer had alleged that she received a fraudulent confirmation from X. X contends that Firm #1 added this statement to the Form U5 as retribution for his having left the firm.

In April 2002, X resigned his position at another previous employer (Firm #2). Firm #2 initially reported on the Form U5 that X had been "discharged." X filed a complaint with NASD Dispute Resolution against Firm #2, contending that he resigned his position after Firm #2 began to make deductions from his salary, without his authorization, to settle a customer complaint. The arbitrator awarded X \$1,500 and ordered Firm #2 to change the Form U5 language under "reason for termination" from "discharged" to "voluntary."

Four customer complaints have been filed against X. Three complaints were received while X was employed with Firm #1. The final complaint was received while he was employed with Firm #2.

The first complaint was received in April 2000. The customer alleged that a margin trade had not been authorized. The alleged compensatory damages were \$30,000. The Central Registration Depository[®] ("CRD") record does not indicate any further action on this complaint.

The second complaint was also received in April 2000. The customer alleged unauthorized use of margin, misrepresentation, and that X failed to follow instructions. The alleged compensatory damages were \$7,500. The CRD record does not indicate any further action taken with regard to this complaint.

The third complaint was received in May 2000. The customers alleged that X failed to execute orders in various securities and that he executed one unauthorized transaction. The

² On the second count, X was sentenced to three years' probation and assessed a fine of \$500.

alleged compensatory damages were \$8,500. CRD does not indicate any further action taken with regard to this complaint.

The final complaint was received in February 2002. The customer alleged that X failed to execute completely the sell side of a day trade. The firm settled the complaint with a payment of \$70,000 to the customer. X stated that the complaint was settled without his authorization and that the firm deducted monies from his paycheck without his authorization. X took this matter to NASD Dispute Resolution; the arbitrator ruled in his favor and awarded him \$1,500.

2. The Firm

The Sponsoring Firm has been a member of NASD since 1993. The Firm has three offices of supervisory jurisdiction ("OSJs") and three branch offices. In addition, the Firm employs 18 registered principals, 100 registered representatives, and 115 employees. The Sponsoring Firm is engaged in a general securities business.

The Firm does not employ any statutorily disqualified individuals and it is not a member of any other self-regulatory organization ("SRO").

The Firm's 2002 routine examination is still under review by NASD's State 1 District Office. The 2003 routine examination had not yet been scheduled at the time of the eligibility hearing. A 2002 branch examination was concluded with no formal or informal disciplinary action.

In the past, the Sponsoring Firm employed one other statutorily disqualified individual. The 2002 statutory disqualification examination was concluded with no informal or formal disciplinary action. That individual is no longer employed by the Firm.

Four arbitration matters have been filed against the Firm with NASD Dispute Resolution and are currently pending.

C. X's Proposed Business Activities and Supervision

The Sponsoring Firm proposes to continue to employ X as a general securities representative in the Firm's home office in State 1. He would continue to be engaged in selling individual stocks to relatively active traders. The Firm also proposes that the Proposed Supervisor will be X's primary, responsible supervisor. The Proposed Supervisor is a registered principal and the Firm's Director of Investment Banking, and he has been employed by the Sponsoring Firm since October 2002. He entered the securities industry in 1993. He became registered as a general securities representative (Series 7) in April 1997 and as a general securities principal (Series 24) in July 1997. The Proposed Supervisor does not supervise any other individuals and he does not have any informal or formal disciplinary history.

D. Member Regulation Recommendation

Member Regulation recommends that the Application be denied because the felony offense was serious and because X is a repeat offender. Member Regulation states that this demonstrates an inability on the part of X to conform his behavior to applicable laws and regulations. In addition, Member Regulation notes that X's disqualifying event was very recent, and states that sufficient time has not yet elapsed for X to have demonstrated his willingness or ability to operate responsibly in the securities industry. Member Regulation also notes that X remains subject to probation and that he has customer complaints on his record.

E. Discussion

After carefully reviewing the entire record in this matter, we deny the Sponsoring Firm's Application to continue to employ X as a general securities representative.

In reviewing this type of application, we have considered whether the particular felony at issue, examined in light of the circumstances related to the felony, and other relevant facts and circumstances, creates an unreasonable risk of harm to the market or investors.³ For the reasons set forth below, we conclude that X's continued participation in the securities industry would present an unreasonable risk of harm to the market or investors.

X was convicted of a recent, serious criminal offense. Moreover, he is a repeat offender, having had three DUI convictions between May 2000 and August 2002, all by the age of 23. In addition to the third DUI conviction being a felony, he was convicted of aggravated, unlicensed operation of a motor vehicle. We share Member Regulation's concern that this pattern demonstrates that X may be unable to conform his behavior to applicable laws and regulations.

We are impressed with the evidence that X presented at the hearing that he has been involved with Alcoholics Anonymous since early 2002, following his last DUI arrest, and has completed intensive inpatient and outpatient programs. We are also impressed with the testimony given by the individuals from the Court Intervention Project about X's so far successful rehabilitation and therapy. Yet we note that X has acknowledged and treated his chronic alcohol problem for less than two years. We do not believe that sufficient time has passed for him to demonstrate that the change in his behavior pattern is fundamental and longlasting and that he can conduct himself in a responsible and compliant fashion in the securities industry. This is particularly true given that X's proposed business activities, the sale of individual stocks to active traders, will involve higher professional risks than selling other product offerings to different investors.

³ See Frank Kufrovich, Exchange Act Rel. No. 45437, 2002 SEC LEXIS 357, at *16 (Feb. 13, 2002) (upholding NASD's denial of a statutory disqualification applicant who had committed non-securities related felonies "based upon the totality of the circumstances" and NASD's explanation of the bases for its conclusion that the applicant would present an unreasonable risk of harm to the market or investors).

We note the lack of disciplinary history for the Firm and the Proposed Supervisor, but these facts do not outweigh our concern about the seriousness and recency of X's offense, his history of customer complaints, the relatively short period of his sobriety and the certain pressure that will inhere in pursuing the same business activities as those he pursued before the felony conviction.

Accordingly, we find that it is not in the public interest and that it creates an unreasonable risk of harm to the market or investors, to permit X to continue his employment in the securities industry.

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President and
Corporate Secretary

LATER CASE HISTORY:

X subsequently appealed this decision to the SEC, and then withdrew the appeal. Accordingly, the NAC decision is the final decision in this matter.