

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of	Redacted Decision
X	<u>Notice Pursuant to</u> <u>Rule 19h-1</u>
as a	<u>Securities Exchange Act</u> <u>of 1934</u>
General Securities Representative	<u>Decision No. SD05006</u>
with	Dated: 2005
The Sponsoring Firm	

On August 26, 2004, the Sponsoring Firm¹ (“the Firm”) completed a Membership Continuance Application (“MC-400” or “the Application”) seeking to permit X, a person subject to a statutory disqualification, to associate with the Sponsoring Firm as a general securities representative. In March 2005, a subcommittee (“Hearing Panel”) of NASD’s Statutory Disqualification Committee held a hearing on the matter. X appeared, accompanied by X’s proposed supervisor at the Sponsoring Firm; NG, the Sponsoring Firm’s president and assistant compliance officer; and DI, the Sponsoring Firm’s chief executive officer. LL and JV appeared on behalf of NASD’s Department of Member Regulation (“Member Regulation”).

After carefully reviewing the entire record in this matter, we approve the Firm’s Application to employ X as a registered representative.

A. X’s Statutorily Disqualifying Event

X is subject to a statutory disqualification because in June 2001, he was convicted of aggravated unlicensed operation of a motor vehicle, a felony in State 1. At the time of his December 2000 arrest, X was driving under the influence of alcohol and with a restricted driver’s license, which was restricted due to an arrest 10 days earlier on a separate driving while intoxicated charge. Also in June 2001, X was convicted of driving while intoxicated, a misdemeanor. In September 2001, the presiding judge ordered X to pay a \$1,000 fine and \$210 in court costs and sentenced him to probation for a term of five years. In addition, X’s driver’s license was revoked for one year. X’s probationary period is scheduled to expire in September 2006.

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.

In May 2002, subsequent to his felony conviction, X was charged with attempted assault in violation of State 1 Penal Law §120.05 (a felony). X ultimately pled guilty to a misdemeanor violation. For this conduct, X was sentenced in February 2003, to six months' probation and was ordered to pay a \$200 fine and \$50 in surcharges. X testified that alcohol was not involved on his part in this altercation.

B. Background Information

1. X

X began working in the securities industry in October 2003, when he was employed as a "broker trainee" by Firm A, which sponsored him to take the general securities representative (Series 7) qualification examination. While at Firm A, X studied for the Series 7 qualification examination and, for three months, prospected for, and sent literature to, new clients who were located in the United Kingdom. After meeting the Sponsoring Firm employees who also were preparing for the Series 7 examination, in April 2004, X applied to register with the Sponsoring Firm as a general securities representative. In June 2004, X passed the Series 7 qualification examination; in June 2004, he qualified as a uniform securities state law agent (Series 63). After X qualified, the Sponsoring Firm informed him that he could no longer work for the Firm as a broker trainee unless and until NASD approved an MC-400 application. Since January 2005, X has worked at a supermarket.

2. The Firm

The Sponsoring Firm is based in State 1 and has been an NASD member since June 1999. The Firm has no Offices of Supervisory Jurisdiction or branch offices. The Sponsoring Firm employs seven registered principals and 17 registered representatives. The Firm represents it is engaged in the following types of business: (1) broker-dealer retailing corporate equity securities over the counter; (2) non-exchange member arranging for transactions in listed securities by exchange members; (3) put and call broker or dealer or option writer; and (4) trading securities for its own account. According to the Firm's MC-400, X will be located in the Firm's home office.

The Firm has had two routine examinations, in 1999 and 2003. In the 1999 routine examination, NASD found the Firm to be in general compliance with the rules and regulations reviewed but found certain deficiencies that were the subject of a compliance conference in November 1999. The deficiencies discussed at the compliance conference related to: (1) diligence in opening options accounts; (2) recommendations to customers; (3) supervision of accounts; (4) written procedures and review of transactions and correspondence; (5) qualifications investigated; (6) allocation of exercise assignment notices; and (7) recordkeeping requirements.

The Firm's 2003 routine examination resulted in NASD's acceptance in 2004 of a Letter of Acceptance, Waiver, and Consent ("AWC"). The AWC stated that the Firm and NG permitted associated persons to act in capacities that required registration while their registration

status with NASD was inactive due to noncompliance with NASD's continuing education requirement. The AWC also stated that the Firm, acting through NG, failed to report to NASD securities-related arbitrations; failed to report to NASD the termination of an employee who had failed to disclose outside trading accounts; and failed to file with NASD the statistical and summary information for 13 customer complaints that were required to be reported. The Firm and NG were censured and fined \$12,000, jointly and severally. The Firm was fined an additional \$2,500.

The record shows no other disciplinary history for the Firm. NASD has commenced, but not completed, the 2005 routine examination.

C. X's Proposed Business Activities and Supervision

The Firm has represented that X will be employed as a general securities representative and that his compensation will be a commission-based salary.

The Firm proposes that the Proposed Supervisor will be X's responsible supervisor. The Proposed Supervisor entered the securities industry when he joined the Firm in July 2002. The Proposed Supervisor has been registered with the Firm as a general securities representative (Series 7) since August 2002, a general securities principal (Series 24) since October 2003, and a registered options principal (Series 4) since January 2004. The Proposed Supervisor also passed the uniform securities state law agent qualification examination (Series 63) in August 2002. We are not aware of any formal or informal disciplinary action against the Proposed Supervisor.

The Firm consents to the imposition of the below terms of heightened supervisory conditions for X:²

1. The Sponsoring Firm will amend its written supervisory procedures to state that the Proposed Supervisor is the primary supervisor responsible for X;
2. X will conduct all securities business from the Sponsoring Firm's home office, and he will be seated in close proximity to the Proposed Supervisor;
3. X will not maintain discretionary accounts;
4. X will not act in a supervisory capacity;
5. *The Proposed Supervisor will review and initial X's trades before they are executed. The Proposed Supervisor also will maintain copies of trade tickets and keep them segregated for ease of review;

² Those supervisory terms and conditions marked with an asterisk (*) are special for X and not required of all the Sponsoring Firm registered representatives.

6. *The Proposed Supervisor will review X's outgoing and incoming written correspondence at the time they are either sent or received. No correspondence will be sent or received without the Proposed Supervisor's review and approval;
7. *The Proposed Supervisor will approve all new accounts opened by X and will evidence his approval by initialing the account paperwork;
8. *All complaints pertaining to X, whether verbal or written, will be immediately referred to the Proposed Supervisor for review, and then to the Compliance Department. The Proposed Supervisor will prepare a memorandum to the file as to what measures he took to investigate the merits of the complaint (e.g., contact with the customer) and the resolution of the matter. The Proposed Supervisor will keep documents pertaining to these complaints segregated for ease of review;
9. *The Proposed Supervisor must certify quarterly (March 31st, June 30th, September 30th, and December 31st) to the Compliance Department of the Sponsoring Firm that X and the Proposed Supervisor are in compliance with all of the above conditions of heightened supervision to be accorded X; and
10. For the duration of X's statutory disqualification, the Sponsoring Firm must obtain prior approval from Member Regulation if it wishes to change X's supervisor from the Proposed Supervisor to another person.

D. Member Regulation Recommendation

Member Regulation recommends that the Firm's application be approved.

E. Discussion

In reviewing this type of application, NASD considers 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 association with the Sponsoring Firm as a registered representative, pursuant to the proposed plan of supervision, does not present an unreasonable risk of harm to the market or investors.⁴

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 basis for its conclusion that the applicant would not present an unreasonable risk of harm to the market or investors).

⁴ Pursuant to NASD Procedural Rule 9524(a)(10), the Hearing Panel submitted its written recommendation to the Statutory Disqualification Committee. In turn, the Statutory Disqualification Committee considered the Hearing Panel's recommendation and presented a
[Footnote continued on next page]

There are several areas of concern in this Application. First, X's disqualifying event was serious, and he is still serving the terms of his probation. Second, just 11 months after his disqualifying conviction, X was arrested on felony charges of attempted assault, which resulted in a misdemeanor conviction. Third, there is evidence that X failed to disclose his felony conviction when he filed the Uniform Application for Securities Industry Registration or Transfer ("Form U4") in December 2003 to associate with Firm A.⁵ However, several considerations reduce our concerns.

We note that the felony conviction did not involve securities or financial products, nor did the court find that X acted dishonestly. Although X is still serving his five-year probation, his probation officers have certified that X has complied with all terms of his probation. As for X's subsequent misdemeanor conviction for attempted assault, X testified that the altercation that led to the charge occurred in the context of a fellow fraternity member's suicide, which had a significant emotional impact on his entire fraternity. These circumstances lead us to conclude that this event was a youthful indiscretion that should not weigh heavily against X here.⁶

The record also demonstrates that X acknowledges his alcohol problem and has taken appropriate steps to ensure that he will continue to deal successfully with it. After his arrest, X voluntarily enrolled in an outpatient alcohol treatment program, which he successfully completed. Subsequently, and as a condition of his probation, X enrolled in, and successfully completed, a second, three-month outpatient alcohol rehabilitation treatment program, from October 2004 to January 2005. X's outpatient counselor stated that X's participation in the program was an asset to the other program participants. In addition, X testified that he has not had any alcohol in three years. These facts help to persuade us that X has made, and will continue to make, serious and substantial strides to address his substance abuse and put his past behind him. His continuing probation assures us that his compliance is being actively monitored.

With regard to the failure to disclose the felony conviction on the Form U4 X filed to associate with Firm A, we believe X's testimony that he fully discussed all of the details with Firm A, appreciated the gravity of the disclosure, and believed (mistakenly) that his oral disclosure was sufficient to meet his obligations. We find X credible in this regard based, in part, on the fact that he immediately disclosed his felony conviction to the Sponsoring Firm. Although X should have taken personal responsibility to amend the Form U4, we find that his failure to do so was based upon incorrect advice from Firm A, which had advised that his felony

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written recommendation to the National Adjudicatory Council, in accordance with Procedural Rule 9524(b)(1).

⁵ We have supplemented the record with the initial Form U4 that X filed to associate with Firm A.

⁶ X also testified that he is currently eligible for, and has requested, an early discharge from his probation.

conviction was not related to the securities industry and “shouldn’t be a big deal.” Firm A failed to inform X that he was statutorily disqualified.

In X’s new position as a registered representative, the Firm has agreed to heightened supervisory terms and conditions to ensure that X will not present a risk to the market or investors. The Firm has minimal formal and informal regulatory disciplinary history. While the Proposed Supervisor has only been in the securities industry since August 2002, he has no formal or informal regulatory disciplinary history. Moreover, the Firm represented at the hearing that, since the Proposed Supervisor does not currently service any of his own clients or supervise other representatives, he will be able to dedicate his time to training and supervising X. As an element of X’s training, the Sponsoring Firm explained that it intends to require X to study for and take the general securities principal (Series 24) qualification examination, even though X will not be permitted to register or serve in any principal or supervisory capacities. For these reasons, we are satisfied that this plan of heightened supervision will be effective in detecting and deterring any possibility of misconduct with respect to clients of the Firm or the public.

NASD certifies that X meets all applicable requirements for the proposed employment, that the Firm is not a member of any other self-regulatory organization, and that X and the Proposed Supervisor have represented that they are not related by blood or marriage.

Accordingly, we approve X as a registered representative with the Sponsoring Firm. In conformity with the provisions of SEC Rule 19h-1, the association of X will become effective within 30 days of the receipt of this notice by the Commission, unless otherwise notified by the Commission.

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney
Senior Vice President and Corporate Secretary