

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of

X

as a

General Securities Representative

with

The Sponsoring Firm

Redacted Decision

Notice Pursuant to
Rule 19h-1
Securities Exchange Act
of 1934

Decision No. SD04010

Date: 2004

On September 4, 2003, 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 October 2003, a subcommittee ("Hearing Panel") of the Statutory Disqualification Committee of NASD held a hearing on the matter. X appeared, accompanied by his proposed supervisor who is a branch manager at the Firm's branch office where X seeks to be employed. X was also accompanied by the Sponsoring Firm's Director of Compliance, and the Sponsoring Firm's CEO, all of whom testified on X's behalf. PL 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 September 2002, after a bench trial, a State 1 county judge found him guilty of two felony charges of attempted sexual assault: (1) causing the penetration of the female sexual organ of the victim by means of forcing his hand between her legs without her consent; and (2) touching the sexual organ of his female victim with his hand, without her consent. The judge sentenced X to six years in prison and imposed a \$1,000 fine. The judge suspended the sentence and instead sentenced X to 10 years' probation

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.

and imposed a \$1,000 fine and 160 hours of community service. X is currently on probation until September 16, 2012.

B. Background Information

1. X

X was employed in the securities industry from May 1987 to November 2002. He passed the Series 6 (investment company products/variable annuity contracts representative qualification examination) in July 1987, the Series 63 (uniform securities agent state qualification examination) in July 1987, and the Series 7 (general securities representative qualification examination) in January 2001.

X's Uniform Application for Securities Industry Registration or Transfer ("Form U4") shows that in January 2000, X was charged with one felony count of "indecenty with a child/contact." In September 2000, X was acquitted of this charge by a jury.²

The record indicates no other regulatory or disciplinary actions against X.

2. The Firm

The Sponsoring Firm became a member of NASD in July 1998. The Firm has 31 offices of supervisory jurisdiction ("OSJs") and 19 branch offices. In addition, the Firm employs 35 registered principals and 84 registered representatives. 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 organizations ("SRO").

In 2003, NASD issued the Sponsoring Firm a Letter of Caution ("LOC") for failing to submit a hard copy response to NASD pursuant to an information request concerning a mutual fund breakpoint survey. The Firm's 2003 routine examination has commenced but is not yet finalized.

C. X's Proposed Business Activities and Supervision

The Sponsoring Firm proposes to employ X as a general securities representative in the Firm's branch office in State 1. The Firm also proposes that RS will be X's primary, responsible supervisor. The Proposed Supervisor is the branch manager for the Sponsoring Firm's State 1 office and he has been employed by the Sponsoring Firm since June 2003. He passed the Series

² X testified at the hearing that this charge was brought by his ex-wife, who asserted that he had touched the breast of his 15 year-old son's girlfriend while hugging her in a social setting.

7 (general securities representative qualification examination) in June 1979 and the Series 24 (general securities principal qualification examination) in August 1999. He has been in the securities industry since 1979, 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 raises concerns regarding X's judgment, character, and ability to work in the securities industry.

E. Discussion

After carefully reviewing the entire record in this matter, we approve the Sponsoring Firm's Application to employ X as a general securities representative, subject to the supervisory terms and conditions set forth below.

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 participation in the securities industry will not present an unreasonable risk of harm to the market or investors.

We recognize that X was convicted of a serious criminal offense. He has been punished by the State 1 legal system, which has imposed on him a lengthy probation that contains rigorous requirements that are intended to punish and rehabilitate him.⁴ In considering this Application, we assess the totality of the circumstances in reaching a judgment about X's future ability to deal with the public in a manner that comports with NASD's requirements for high standards of commercial honor and just and equitable principles of trade in the conduct of this business. Our assessment includes the nature of the Sponsoring Firm's business, its culture and values, its

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).

⁴ The Order of Probation includes requirements for psychological counseling and participation in a sex offender treatment program. The evidence includes a letter dated October 2003 from the director of the sex offender counseling group that X attends, which states that X is very conscientious and has taken a leadership role in the group. The evidence also includes a letter from X's probation officer dated October 2003 that indicates that X has fully complied thus far with all terms of his probation.

disciplinary history, if any, the experience, qualifications, and disciplinary history of X's proposed supervisor, the likely effectiveness of the proposed supervisory plan, the proposed activities in which X will engage, how serious and recent the conviction is, and whether X's conduct indicates that he may not act in the securities industry with honesty and integrity.

We asked X about his crimes and had the opportunity to assess his demeanor at the hearing. We find that he is credible and truly remorseful, and that he has taken full responsibility for his actions. He has thus far complied fully with all terms of his probation, including the early completion of his community service requirements. He has the full support of his wife, his colleagues and his business associates in his effort to restart his career in the industry and restore his good name.

Significantly, X has no disciplinary history in his 16 years of employment in the securities business. Further, his proposed supervisor is a qualified general securities principal who has been employed in the securities business for more than 24 years with no formal or informal regulatory history. The Proposed Supervisor testified that he worked with X for six years at a previous firm, and that he believed that X was the finest representative that he had ever supervised. We are impressed with the fact that the Proposed Supervisor chose to leave his secure relationship with that previous firm to follow X to the Sponsoring Firm and attempt to have him reinstated through this application process.⁵ The Proposed Supervisor also acknowledged that he understood and accepted the heightened responsibilities that he would be undertaking as the supervisor of a statutorily disqualified individual.

The Proposed Supervisor and X have stated that they will work closely as a team. They will share all customers, and all customer contacts will be made together on site. X and the Proposed Supervisor have also proposed that they will share in all commissions from their insurance and securities customers. We approve this proposal, however, only with the additional requirement that the Firm designate another appropriate principal who will review each account in which X and the Proposed Supervisor share commissions. If such a principal is not designated by the Firm, then X and the Proposed Supervisor may not share commissions. The Firm shall notify Member Regulation with the name of the proposed additional principal. Within 60 days Member Regulation, in its sole discretion, may object to the additional principal and require the Firm to propose a different principal.

Finally, the Sponsoring Firm has been a member of NASD since July 1998, and it does not have a disciplinary history that raises regulatory concern. Employee 1 and Employee 2 testified as to the small family-owned nature of the Firm and its policy of requiring employees to strictly adhere to all regulatory and firm requirements. They testified to several examples of recent situations involving terminations of employees who had failed to follow the Firm's strict

⁵ X testified at the hearing that the previous firm's policy was not to sponsor any statutorily disqualified individuals because that firm did not have appropriate support systems in place to do so.

supervisory procedures, and they stated that they had assured X that this would be the case if he failed to observe Firm policies and the conditions of his proposed heightened supervision.

Given the nature of X's felony offense, and the number of years that he has been employed successfully in the securities industry, we conclude that the following supervisory conditions agreed to by the Sponsoring Firm will provide the enhanced compliance measures necessary to monitor X's activities:

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 not maintain discretionary accounts;
3. *X will not act in a supervisory capacity;⁶
4. *X will be supervised onsite by the Proposed Supervisor;
5. *the Proposed Supervisor will accompany X on every client contact, and all such contacts will be made on site at the Firm;
6. The Firm will permit X and the Proposed Supervisor to share in client commissions only if each such account is reviewed and approved at least annually by another designated principal of the Firm;
7. The Proposed Supervisor will review all of X's new account forms and will evidence his review by signing his signature to the forms;
8. The Proposed Supervisor will review X's order tickets on a daily basis;
9. *The Sponsoring Firm's Compliance Department branch audit will include a mandatory review of all of X's customer accounts;
10. 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;
11. All complaints pertaining to X, whether verbal or written, will be simultaneously referred for review by the Proposed Supervisor and the

⁶ Those supervisory terms and conditions denoted with an asterisk (*) are special for X and not required of all registered representatives.

Firm's 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. Documents pertaining to these complaints should be kept segregated for ease of review;

12. *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 responsible supervisor from the Proposed Supervisor to another person; and
13. *The Proposed Supervisor must certify quarterly (March 31st, June 30th, September 30th, and December 31st) to the Sponsoring Firm's Compliance Department that the Proposed Supervisor and X are in compliance with all of the above conditions of heightened supervision to be accorded X.

We conclude that X's employment in the securities industry, subject to the foregoing conditions of heightened supervision, will not create an unreasonable risk of harm to the market or investors. NASD certifies that: 1) X meets all applicable requirements for the proposed employment; 2) the Sponsoring Firm is not a member of any other self-regulatory organization; and 3) X and the Proposed Supervisor have represented that they are not related by blood or marriage.

Accordingly, in conformity with the provisions of SEC Rule 19h-1, the association of X as a general securities representative with the Sponsoring Firm will become effective within 30 days of the Commission's receipt of this notice, unless otherwise notified by the Commission.

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President and
Corporate Secretary