

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

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

Decision No. SD04011

Date: 2004

On May 29, 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 February 2004, a subcommittee ("Hearing Panel") of NASD's Statutory Disqualification Committee held a hearing on the matter. X appeared in person at the hearing, and his proposed supervisor participated by telephone. LL appeared on behalf of NASD's Department of Member Regulation ("Member Regulation").

A. X's Statutorily Disqualifying Event

X is statutorily disqualified because in January 1997 he pleaded guilty in a State 1 court to the felony offense of operating a motor vehicle while under the influence of alcohol ("DUI"). The DUI conviction is a felony because it was X's third DUI offense: he was previously convicted of DUI misdemeanors in April 1989 and September 1995. For his January 1997 conviction, the court assessed a \$1,000 fine against X, placed him on probation for five years, and revoked his driver's license for one year. X was arrested again for DUI in May 1998. This arrest was treated as a misdemeanor conviction and the court extended his probation from the January 1997 conviction. X's probation expired in January 2002.

B. Background Information

1. X

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.

X first registered in the securities industry in December 1988 as a uniform securities agent (Series 63). He later qualified as a general securities representative in May 1998. He was associated with three firms between 1997 and 2001, without disclosing his felony status and without having undergone an eligibility proceeding with NASD. The record shows no previous regulatory actions taken against X.

2. The Firm

The Sponsoring Firm is based in State 1 and it has been a member of NASD since February 1974. The Firm has one branch office and two offices of supervisory jurisdiction ("OSJs"). In addition, the Firm employs 10 registered principals, 32 registered representatives, and two non-registered employees. The Sponsoring Firm represents on the MC-400 that it operates as an introducing full service broker-dealer.

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

After completing the Firm's 1998 routine examination, NASD issued the Sponsoring Firm a Letter of Caution ("LOC") for failing to prepare and maintain a checks received and forwarded blotter for checks received from its clearing firm. The Firm's last routine examination was conducted in 2002, and it resulted in a compliance conference for violations of NASD membership and registration rules. In 2003, NASD issued the Firm an LOC for failing to respond to a breakpoint survey from NASD. The record shows no other regulatory actions against the Firm.

C. X's Proposed Business Activities and Supervision

The Sponsoring Firm proposes to employ X as a general securities representative in the Firm's home office, which is also an OSJ, in State 1. 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 President; he has been employed by the Sponsoring Firm since August 1993. He has been in the securities industry since 1981. He registered as a general securities representative (Series 7) in February 1981 and as a general securities principal (Series 24) in July 1999. As President of the Firm, the Proposed Supervisor has oversight responsibility for all of the registered representatives of the Sponsoring Firm, but the Firm proposes that he would have day to day supervisory responsibility only for X.

The Proposed Supervisor's Central Depository Record® ("CRD") shows that he has been the subject of 22 customer complaints. The Proposed Supervisor asserts that the complaints against him all emanated from complaints against a firm with which he was previously associated, Firm One, for limited partnership interests held by Firm One clients at a time when the Proposed Supervisor was a supervisor there. The complaints were settled through a class action lawsuit, and the Proposed Supervisor maintains that he did not participate in any of the financial settlements. The record shows no other complaints or regulatory proceedings against the Proposed Supervisor.

D. Member Regulation Recommendation

Member Regulation recommends that the Application be denied because the record shows that X willfully violated NASD rules by associating with numerous NASD member firms without properly disclosing his statutory disqualification status, from the date of his felony conviction in January 1997 through December 2001. Member Regulation also states that X's Series 7 registration is questionable because he was working in an unapproved status with Firm A when he qualified for the Series 7 in May 1998.

In addition, Member Regulation states that the Sponsoring Firm proposed a weak plan of heightened supervision for X.

E. Discussion

After carefully reviewing the entire record in this matter, we deny the Sponsoring Firm's Application 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.² For the reasons set forth below, we conclude that X's participation in the securities industry would present an unreasonable risk of harm to the market or investors.

We find that X willfully violated NASD rules by associating with numerous member firms without properly disclosing his statutory disqualification status. At the time of his felony arrest and later conviction in January 1997, X was employed by Firm A. He contends that he verbally advised his then manager at Firm A of the conviction, and that the manager told him "not to worry about it." The record, however, contains two written statements, dated December 18 and 30, 2003, from X's former managers at Firm A that assert that X did not advise them, verbally or in writing, about the 1997 DUI felony conviction. X admits that he did not amend his Uniform Application for Securities Industry Registration or Transfer ("Form U4") to reflect the felony charge or the conviction and that he did not seek advice from Firm A's compliance division or anyone else. He also admits that he did not advise anyone at Firm A about his 1998 DUI misdemeanor conviction and the resulting extension of his probation.

X left Firm A in July 2000 and became employed by Firm B. He maintains that he advised the human resources personnel there of his felony conviction, but admits that he did not disclose either the felony charge or the conviction on the Form U4 he submitted to Firm B.

² 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).

Approximately 18 months later, Firm C purchased Firm B. As a result, X completed another Form U4, and once again, did not disclose his felony charge or conviction. After Firm C received the results of X's fingerprinting,³ which revealed the felony conviction, he resigned because Firm C would not sponsor him in a statutory disqualification proceeding.

This record demonstrates that X deliberately and repeatedly concealed his felony conviction. From the time of the January 1997 conviction, and for four years thereafter, he falsely omitted from his Forms U4 that he had been charged with and convicted of a felony. X admits that he was not truthful in filling out his Forms U4 and states that he was "concerned with keeping a job." Accordingly, X worked in the securities industry for almost five years without disclosing his felony conviction, as required. Disclosure is a key factor in NASD's regulatory program to protect investors and preserve market integrity. Each registered representative is obligated to be truthful and promptly disclose reportable events to employers. We find that X's admitted failure to disclose his felony conviction demonstrates a flagrant disregard for NASD's rules, and shows that he did not take responsibility for his conduct. Therefore, we conclude that X should not be permitted to re-enter the securities industry where he would be placed in a position of trust and confidence with the investing public.

We also share Member Regulation's concern that X may be improperly registered as a general securities representative because he obtained his Series 7 while he was associated with Firm A in 1998. Because X had failed to disclose his felony conviction to Firm A, he was working in an unapproved status. Under normal circumstances, a statutorily disqualified individual such as X would not have been permitted to associate with a member until he or she had completed an MC-400 eligibility proceeding.

We also note that X testified at the hearing that since his felony conviction occurred in 1997, he has struggled with his alcohol addiction and has attended several counseling programs that were mandated by the court. He stated that he has abstained from using alcohol for one year. Thus, we do not believe that sufficient time has passed for him to demonstrate that he is rehabilitated, and that the change in his behavior is fundamental and longlasting such that he can conduct himself in a responsible and compliant fashion in the securities industry.

Finally, we are not convinced that the Firm has proposed an adequate plan of supervision for a statutorily disqualified individual, or that the Proposed Supervisor fully understands his proposed role as supervisor to such an individual. The Proposed Supervisor repeatedly stated at the hearing that he would consider adopting any supervisory plan that NASD or the Hearing Panel proposed to him, but the record shows that he did not take the initiative to develop a plan tailored to the substance problem that underlies X's conviction or subsequent repeated omissions to disclose the conviction in filings required by the industry.

We note the lack of formal disciplinary history for the Firm, but this fact did not outweigh the concerns that we have outlined above.

³ The record does not indicate whether Firm B received any fingerprinting results on X that might have demonstrated his 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 re-enter the securities industry.

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President and
Corporate Secretary