BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of the Association of X[1] as a General Securities Representative with The Sponsoring Firm	Redacted Decision Notice Pursuant to Rule 19h-1 Securities Exchange Act of 1934 SD10003 Date: 2010

I. Introduction

On March 30, 2009, the Sponsoring Firm filed a Membership Continuance Application ("MC-400" or "the Application") with FINRA's Department of Registration and Disclosure. The Application requests that FINRA permit X, a person subject to a statutory disqualification, to associate with the Sponsoring Firm as a general securities representative. In October 2009, a subcommittee ("Hearing Panel") of FINRA's Statutory Disqualification Committee held a hearing on the matter. X appeared at the hearing, accompanied by his wife, his Proposed Supervisor, and his counsel, Attorney 1. FINRA Employee 1, FINRA Attorney 1, and FINRA Attorney 2 appeared on behalf of FINRA's Department of Member Regulation ("Member Regulation").

For the reasons explained below, we approve the Sponsoring Firm's Application.[2]

II. The Statutorily Disqualifying Event

X is statutorily disqualified because in August 2006, he pled guilty in State 1 to one felony count of driving with excessive blood alcohol content ("DUI"). This was a felony

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[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.

[2] Pursuant to FINRA 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 written recommendation to the National Adjudicatory Council.

because he had two prior misdemeanor DUI convictions in State 1 in August 2001, and April 1999. The State 1 court also sentenced X in August 2006. The court suspended his driving privileges for one year; imposed a suspended prison term of three years; placed him on five years' probation; and ordered him to complete a 30-day inpatient alcohol treatment program. X was granted an early release from probation in November 2008. The record shows that X completed a 30-day inpatient alcohol treatment program, and he testified that he continues to attend Alcoholics Anonymous ("AA") meetings and has not drunk alcohol since May 2006 (his third DUI arrest that led to the felony conviction occurred in March 2006).

III. Background Information

A. X

1) Employment History

X first registered in the securities industry as a general securities representative in October 1986, and he requalified in that capacity in May 1993. He qualified as a general securities principal in April 1998. X was previously associated with four firms between August 1986 and April 2008. Since July 2008, X has been engaged as a state-registered financial advisor with Firm 1.

2) Non-Disclosure of Felony Charge and Conviction

a) Securities Industry

At the time of his arrest for the felony DUI in March 2006, X was employed by Firm 2. X testified that he discussed the arrest with his branch manager at Firm 2 on the evening after his arrest, in March 2006, and was informed that the branch manager would refer the matter to his superior, the regional manager. X also stated that in April 2006, he informed his branch manager that he would be entering a 30-day inpatient alcohol treatment center in May 2006, and that he subsequently met with both the branch manager and regional manager to discuss this. Shortly thereafter, Firm 2 approved of and paid for the majority of X's treatment. Further, X testified that after he was convicted of the felony and sentenced in August 2006, he lost his driving license for one year and relied on three Firm 2 employees, one of whom was his branch manager, to drive him to and from his employment. Accordingly, X argued that he did not conceal any information regarding his felony arrest and conviction from his previous employer, Firm 2.

X acknowledged, however, that he did not realize that it was his responsibility to take action and ensure that Firm 2 filed an amendment with FINRA to his Uniform Application for Securities Industry Registration or Transfer ("Form U4") to reflect his felony charge and conviction. He did not discover that Firm 2 had not filed the appropriate Form U4 amendment on his behalf until February 2008, when Firm 2 submitted an amended Form U4 for him to participate in a mass transfer of personnel from Firm 2 to Firm 3. The February 2008 Form U4 amendment fully disclosed, for the first time, X's felony charge and conviction in 2006. In April 2008, Firm 3 filed a Uniform Termination Notice for Securities Industry Registration ("Form U5"), permitting X to resign and stating that "after learning of [X's] previous 2006 class D

felony conviction for driving with excessive blood alcohol content and after applying Firm 3's employment standards, it was determined to terminate X's employment."

Following Firm 3's termination of X, FINRA's City 1 district office conducted an investigation and issued a cautionary letter to X in December 2008, for failing to provide information to Firm 3 concerning his felony arrest and conviction. X, through counsel, responded to that letter in January 2009, stating that Firm 3 had not informed X of the investigation and providing information regarding his disclosures to Firm 2's management. FINRA re-examined the matter and issued a final letter to X in April 2009, stating that FINRA stood by its initial findings and noting that "Registered Persons have the ultimate responsibility to keep their Uniform Application for Securities Industry Registration or Transfer (Form U4) current."

b) Insurance Industry

X testified that in October 2007, while still employed by Firm 2, he applied for renewal of his non-resident State 2 insurance license. He answered "yes" to the question on the insurance form that asked whether he had ever been convicted of a felony. In December 2007, the State 2 Department of Insurance denied X's application for re-licensing, citing his failure to notify the state of his felony conviction within 30 days. X stated that he was "totally unaware of such a requirement."

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One customer complaint was filed against X in March 2004. X's former employer denied the complaint and no further action occurred.

The record shows no other criminal, disciplinary or regulatory proceedings, complaints, or arbitrations against X.

B. The Sponsoring Firm

The Sponsoring Firm is based in City 2, State 1, and it has been a FINRA member since February 2002. The Sponsoring Firm represents that it has four offices of supervisory jurisdiction, 69 branch offices, 112 registered representatives, and 14 registered principals. The Sponsoring Firm represents that it is engaged in a general securities business.

FINRA's most recent routine examination of The Sponsoring Firm was conducted in 2008 and it resulted in a Letter of Caution ("LOC"). The LOC cited the Sponsoring Firm for numerous violations, including unfair mark-ups in six municipal principal transactions; insufficient written supervisory procedures addressing the mark-up and mark-down of municipal and corporate debt securities and net equity requirements; unfair commissions in eight transactions; failure to timely update a Form U5; books and records deficiencies; inaccuracies in cash accounts; and Reg T violations. The Sponsoring Firm responded to the LOC in January 2009, stating that it had addressed the deficiencies noted.

FINRA's 2006 routine examination also resulted in an LOC, citing the Sponsoring Firm for nine late reports of municipal securities sales or purchases. The Sponsoring Firm responded to the LOC in May 2006, stating that it had addressed the deficiencies noted.

FINRA's 2005 routine examination of the Sponsoring Firm resulted in an LOC and the Sponsoring Firm's submission of a letter of Acceptance, Waiver and Consent ("AWC"). The LOC cited the Sponsoring Firm for inadequate written supervisory procedures; books and records violations; untimely reporting of a customer complaint; and an inaccurate Form U5. The Sponsoring Firm responded to the LOC in June 2005, stating that it had taken steps to correct the deficiencies noted. The 2005 AWC cited the Sponsoring Firm for inadequacies in its written supervisory procedures, and imposed a censure and $6,500 fine on the Sponsoring Firm.

The record shows no other complaints, disciplinary proceedings, or arbitrations against the Sponsoring Firm.

IV. X's Proposed Business Activities and Supervision

The Sponsoring Firm proposes that it will employ X as a general securities representative who "will be associated with The Sponsoring Firm as an independent contractor." X testified that he plans to continue with his state-registered investment advisor activities, and that he anticipates that his re-registration as a general securities representative will help him to serve his existing customers better. X will work from a branch office located in City 3, State 1, and he will be compensated by commissions.

X proposes that the Proposed Supervisor, the Sponsoring Firm's compliance officer, will be X's off-site primary supervisor. The Proposed Supervisor will be located in the Sponsoring Firm's home office in City 2, State 1, approximately 60 miles away from X's City 3's branch office. The Proposed Supervisor is also employed as the chief compliance officer of Firm 4 an investment advisory affiliate of the Sponsoring Firm, and as vice president of Firm 5, a State 1-registered investment advisor. The Sponsoring Firm represents that the Proposed Supervisor directly supervises nine producing home office registered representatives for the Sponsoring Firm, and 41 investment advisor representatives for Firm 4. He has only an administrative role at Firm 5. The Sponsoring Firm also represents that the Proposed Supervisor spends 75% of his time related to activities for Firm 4. He does not have any production of his own.

The Proposed Supervisor first registered as an investment company contracts and variable products limited representative in November 1997. He qualified as a general securities representative in August 2003 and as a general securities principal in April 2004. He became associated with the Sponsoring Firm in June 2003. Prior to the Proposed Supervisor's association with the Sponsoring Firm, he was registered with three other investment or investment-related firms. FINRA's Central Registration Depository ("CRD®") indicates that he voluntarily terminated his association with each of his prior employers.

The record shows no criminal, disciplinary or regulatory proceedings, complaints, or arbitrations against the Proposed Supervisor.

The Sponsoring Firm also proposes that when the Proposed Supervisor is not available, Employee 1 will supervise X. Employee 1 has served as the Sponsoring Firm's director of compliance since October 2003. He qualified as a general securities representative in October 1991 and as a general securities principal in January 1998. The record shows no criminal, disciplinary or regulatory proceedings, complaints, or arbitrations against Employee 1.

V. Member Regulation's Recommendation

Member Regulation recommends that the Application be denied for several reasons. First, Member Regulation states that X's conviction is recent and serious, and insufficient time has passed for X to "demonstrate that a change in his behavioral pattern is fundamental and long-lasting and that he can conduct himself in a responsible and compliant fashion in the securities industry." In this regard, Member Regulation takes issue with a statement submitted by X with the MC-400: "In March 2006 I was arrested for Driving While Intoxicated . . . . No injuries to third parties or myself resulted from this incident. As a result of two prior alcohol-related driving offenses (no injuries to third parties or myself resulted from either of these incidents) to which I pled guilty, I was charged with Felony DWI." Member Regulation argues that X's statement "seeks to minimize the gravity of his repeated offenses by rationalizing that they did not result in harm, and failing to acknowledge the potential serious ramifications from such conduct."

Second, Member Regulation contends that X's failure to properly amend his insurance application and his Form U4 to disclose the felony charge and conviction to Firm 2 constitutes intervening misconduct that occurred after the statutorily disqualifying event of the felony conviction in August 2006.

Finally, Member Regulation questions whether the Sponsoring Firm's proposed plan of supervision is adequate to supervise X, particularly because the Proposed Supervisor has other responsibilities and will be located in a different office than X.

VI. Discussion

A. The Legal Standard

In reviewing this type of application, we consider 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] We assess the

[3] *See Frank Kufrovich*, 55 S.E.C. 616, 625 (2002) (upholding FINRA's denial of a statutory disqualification applicant who had committed non-securities related felonies "based upon the totality of the circumstances" and FINRA's explanation of the bases for its conclusion that the applicant would present an unreasonable risk of harm to the market or investors); *see also Timothy H. Emerson, Jr.*, Exchange Act Rel. No. 60328, 2009 SEC LEXIS 2417, at *14 (July 17, 2009) (stating that FINRA "appropriately weigh[ed] all the facts and circumstances surrounding [the applicant's] felony conviction and [the firm's] proposed supervisory plan").

totality of the circumstances in reaching a judgment about X's future ability to deal with the public in a manner that comports with FINRA's requirements for high standards of commercial honor and just and equitable principles of trade in the conduct of his business. In so doing, we recognize that the sponsoring firm has the burden of demonstrating that the proposed association of the statutorily disqualified individual is in the public interest and does not create an unreasonable risk of harm to the market or investors. *See Continued Ass'n of X*, SD06003, slip op. at 5 (NASD NAC 2006), *available at* http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/nacdecisions/p036480.pdf (redacted decision).

Factors that bear on our assessment include the nature and gravity of the statutorily disqualifying misconduct, the time elapsed since its occurrence, the restrictions imposed, whether the person has engaged in any intervening misconduct, and the potential for future regulatory problems. We also consider whether the sponsoring firm has demonstrated that it understands the need for, and has the capability to provide, adequate supervision over the statutorily disqualified person.

After carefully reviewing the entire record in this matter, we find that The Sponsoring Firm has met its burden, and we conclude that X's participation in the securities industry will not present an unreasonable risk of harm to the market or investors. In reaching our conclusion, we considered each of Member Regulation's concerns, which we address below. Accordingly, for the following reasons, we approve the Application for X to associate with the Sponsoring Firm as a general securities representative, subject to the supervisory terms and conditions detailed herein.

B. X's Criminal History and His Evidence of Rehabilitation

As an initial matter, we acknowledge that X was convicted of felony DUI in 2006. We recognize, however, that a State 1 judge imposed a sentence on X for that offense – suspending his driving privileges for one year; placing him on five years' probation; and ordering him to complete a 30-day inpatient alcohol treatment program. X has demonstrated that he has complied with all aspects of that sentence. His driving privileges were reinstated after one year; he was granted an early release from probation in November 2008; and he completed a 30-day inpatient alcohol treatment program. Moreover, X testified that he has accepted responsibility for his alcoholism, has not drunk alcohol since May 2006, has an AA sponsor, and continues to attend AA meetings.

We do not share Member Regulation's concern that X "seeks to minimize the gravity" of his offense and has not had enough time to demonstrate a fundamental change in his behavior. He has been sober for more than three and one-half years, and he continues to be an active participant in AA. In addition, we found credible X's testimony at the hearing that he fully accepts responsibility for his actions and does not absolve himself of such responsibility because his drunk driving did not result in harm to himself or others. X testified that he intended the statement in the MC-400 that Member Regulation questioned to be a statement of fact – that no one was injured – and not an excuse for his misconduct. X testified that he acknowledges the

danger of his alcoholism and his criminal actions in driving while drunk and that he has taken the appropriate steps to rehabilitate himself.

C. X's Failure to Amend His Form U4 and Insurance Application

The record shows that X did, indeed, fail to timely amend his Form U4 after he was arrested and charged with a felony in March 2006 and convicted of a felony in August 2006. For this failure, FINRA's City 1 district office issued him a cautionary letter in December 2008. FINRA did not bring a formal action against X and did not find that he willfully failed to disclose the charge and conviction to Firm 2, which finding would itself constitute a statutorily disqualifying event. *See* Securities Exchange Act of 1934 ("Exchange Act") Sec. 3(a)(39)(F); FINRA By-Laws, Sec. 4. Similarly, X failed to promptly update his application for a non-resident State 2 insurance license within the 30-day period.

We recognize that X's failure to ensure that his Form U4 and his insurance application were promptly and properly updated weighs against our approving this Application.[4] We note, however, that FINRA's City 1 district office resolved this matter with a letter of caution. We also find that the preponderance of the evidence in this record supports X's contention that he discussed the gravity of the situation with his former supervisor and did not act with the intention to conceal his criminal offense or its consequences from his former employer. To the contrary, X promptly informed his supervisor at Firm 2 of his felony arrest and conviction in 2006, and his problem with alcoholism. Such complete disclosure was necessary to address the question of his continuing employment while attending a 30-day inpatient alcoholism treatment program and dealing with the one-year suspension of his driving license. Our conclusion is based on the record evidence and on our assessment of X's credibility as a witness. "Credibility determinations of the initial fact-finder, which are based on hearing the witnesses' testimony and observing their demeanor, are entitled to considerable weight and deference and can be overcome only where there is substantial evidence for doing so." *John Montelbano*, Exchange Act Rel. No. 47227, 2003 SEC LEXIS 153, at **21-22 (Jan. 22, 2003).

D. The Sponsoring Firm and the Supervisor's Ability to Supervise X

We also find that the Sponsoring Firm and the Purposed Supervisor are qualified to supervise a statutorily disqualified individual such as X.

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[4] X testified that he did not have occasion to review and amend his Form U4 at any time during his employment with Firm 2. As to the seven Forms U4 referenced by Member Regulation that had been submitted on X's behalf by Firm 2 between the time of his felony arrest in March 2006 and the time of his transfer to Firm 3 in February 2008, there is no evidence that X ever reviewed them or signed them. Further Member Regulation submitted only a schedule reflecting the dates of those amendments, and not the substance of the amendments. On balance, while we are concerned that X did not timely amend his Form U4, we find that the other factors in this Application substantially outweigh this concern.

The Sponsoring Firm has been a FINRA member since 2002. The record shows that the Sponsoring Firm has no formal disciplinary history. FINRA's routine examinations from 2005 through 2008 led to the issuance of three LOCs and one AWC. We are persuaded that the Sponsoring Firm has satisfactorily responded to FINRA regarding the deficiencies cited in those reviews and has made the necessary corrections to its procedures.

As to the actual merits of the Sponsoring Firm's proposed plan of supervision for X, Member Regulation concedes that the plan itself is "adequate." Member Regulation's main points of contention against the Sponsoring Firm and the Proposed Supervisor's ability to supervise X are: 1) the Proposed Supervisor will be supervising X from an off-site location; and 2) the Proposed Supervisor has insufficient time to devote to the heightened supervision of X.

While we agree that on-site supervision is the ideal standard for most statutorily disqualified individuals, we do not find that it is always necessary. We have approved off-site supervision in prior cases, particularly where the statutorily disqualifying event was DUI-related and the individual otherwise posed no risk to the market or investors. *See Continued Ass'n of X*, SD02009, slip op. at 6 (NASD NAC 2002), *available at* http://www/finra.org/web/groups/industry/@ip/@enf/@adj/documents/nacdecisions/p011557.pdf (redacted decision) (approving off-site supervision for person convicted of felony DUI); *see also, Ass'n of X*, SD07004, slip op. at 5 (NASD NAC 2007), *available at* http://www/finra.org/web/groups/industry/@ip/@enf/@adj/documents/nacdecisions/p117870.pdf (redacted decision) (approving off-site supervision for person convicted of willfully failing to disclose a felony charge on his Form U4). X was employed in the securities industry for more than 20 years without incident, and we find that in the circumstances of this case, the proposed supervisory plan is comprehensive and addresses our concerns with off-site supervision. That plan, set forth below, includes four in-person visits per month between X and the Proposed Supervisor for discussion of all business transactions. The Proposed Supervisor will visit X's office a minimum of two times per month, and X will visit the Proposed Supervisor in the home office two times per month. In addition, X must inform the Proposed Supervisor of any absence from the office in excess of four hours, whether intended or unintended, and include the reason and total time frame expected for such absence.

With regard to Member Regulation's concern that the Proposed Supervisor has conflicting responsibilities that will interfere with his supervision of X, we found credible the Proposed Supervisor's testimony that he will be able to supervise X pursuant to heightened supervisory conditions and that he fully understands the responsibility that he is undertaking in doing so. The Proposed Supervisor testified that the people who report to him are not "active traders," and that he reviews only approximately 10 trades daily. We have also considered that X testified that his business is "centered on asset allocation for risk management," and that his "primary business is managed money."

In its MC-400, the Sponsoring Firm proposed an initial plan of heightened supervision for X. In response to concerns raised by the Hearing Panel about the proposed number of face-to-face visits between the Proposed Supervisor and X, the Sponsoring Firm revised its initial plan by doubling the number of those visits. Given the nature of X's felony offense and the fact that he has had a long and successful career in the securities industry prior to his disqualification, we

conclude that the following procedures proposed 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 and that when the Proposed Supervisor is absent, The Sponsoring Firm Employee 1 will supervise X;

2. X will not maintain discretionary accounts or act in a supervisory capacity;

3. The Proposed Supervisor will review and pre-approve each securities account prior to X opening the account. The Proposed Supervisor will document the account paperwork as approved with a date and signature and maintain the paperwork at the Sponsoring Firm's home office;

4. The Proposed Supervisor will review and approve X's trades on a T+1 basis. The Proposed Supervisor will review the trade reports on a T+1 basis and evidence his review by initialing the trade reports;

5. X will be required to complete a monthly activities acknowledgement in which he provides a "yes" or "no" response with respect to the following items:

    a. Received checks and/or securities;
    b. Engaged in "cold-calling"/telephone solicitations;
    c. Received or given a gift/gratuity to or from a customer;
    d. Sent sales correspondence (by mail, fax, or in person);
    e. Published advertisements/distributed sales literature;
    f. Participated in a private securities transactions;
    g. Started or ended an outside business activity;
    h. Began or ended employment of an unregistered assistant;
    i. Received a customer complaint; and
    j. Been subject to a reportable event;

6. The Proposed Supervisor will review X's activity acknowledgement and any support blotter or other documentation on a monthly basis, and he will make notes and evidence approval with the date and his initials and maintain it at the Sponsoring Firm's home office;

7. For the purposes of client communication, X will only be allowed to use an email account that is held at the Sponsoring Firm, with all emails being filtered through the Sponsoring Firm email system. If X receives a business-related email message in another email account outside the Sponsoring Firm, he will immediately deliver that message to the Sponsoring Firm's email account. X will also inform the Sponsoring Firm of all outside email accounts that he maintains. The Proposed Supervisor will conduct, at a minimum, a weekly review of all email messages that are either sent or received by X. The Proposed Supervisor

will maintain and supervise X's email so that it is easily accessible and available for review during any statutory disqualification audit;

8. All customer complaints pertaining to X, whether verbal or written, will be immediately referred to the chief compliance officer or his designee. The Sponsoring Firm's compliance department will prepare a memorandum to the file as to what measures were taken to investigate the merits of the complaint and the resolution of the matter, and will keep documents pertaining to these complaints segregated for ease of review;

9. The Proposed Supervisor will conduct a minimum of two unannounced office visits per month to X's office. X is expected to be at his office daily during normal business hours (Monday through Friday 8:00 a.m. to 4:30 p.m.). The Proposed Supervisor will maintain a log of his visits;

10. X will visit the Proposed Supervisor at the home office two times per month on dates and times to be provided to X by The Proposed Supervisor, which may be provided with less than one day's notice. The Proposed Supervisor will maintain a log of these visits;

11. X is required to inform the Proposed Supervisor of absences from the office that are greater than four hours, whether intended or unintended, including the reason and total time frame for such absence. This includes meetings with clients to be conducted at a location other than X's office. The Proposed Supervisor will maintain a log of X's absences away from his office;

12. X will provide the Proposed Supervisor with an alternative means of communication (i.e. cell phone number) to enable the Proposed Supervisor to contact X when he is away from the office during normal business hours; and

13. The Proposed Supervisor will make a compliance visit to X's business location no less than annually to conduct an on-site examination of X's books and records. The Proposed Supervisor will maintain evidence of these reviews.

Finally, we order that the Sponsoring Firm must add the following provisions to complete its plan of heightened supervision for X:

14. For the duration of X's statutory disqualification, the Sponsoring Firm must obtain prior approval (or subsequent approval, if warranted) from Member Regulation if it wishes to change X's responsible supervisor from the Proposed Supervisor to another person, or otherwise alter these supervisory procedures; and

15. The Proposed Supervisor must certify quarterly (March 31, June 30, September 30, and December 31) to the Sponsoring Firm's compliance department that he and X are in compliance with all of the above conditions.

FINRA certifies that: 1) X meets all applicable requirements for the proposed employment; 2) the Sponsoring Firm represents that it is not a member of any other self-regulatory organization; and 3) X, the Proposed Supervisor, and the Sponsoring Firm Employee 1 represent that they are not related by blood or marriage.

VII. Conclusion

Accordingly, we approve the Sponsoring Firm's Application to employ X as a general securities representative, subject to the above-mentioned heightened supervisory procedures. In conformity with the provisions of Exchange Act Rule 19h-1, the association of X as a general securities representative with the Sponsoring Firm 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,

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Marcia E. Asquith
Senior Vice President and Corporate Secretary