

BEFORE THE NATIONAL BUSINESS CONDUCT COMMITTEE

NASD REGULATION, INC.

In the Matter of the Association of X as a General Securities Representative with The Sponsoring Firm	Redacted Decision <u>Notice Pursuant to</u> <u>Section 19(d)</u> <u>Securities Exchange Act</u> <u>of 1934</u> SD98001
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This matter involves the association of X¹, a person subject to a statutory disqualification, as a general securities representative with a member firm located in Florida ("the Sponsoring Firm" or "the Firm"). A hearing in the matter was held in October 1997 before a subcommittee ("Hearing Panel") of the Statutory Disqualification Committee of NASD Regulation, Inc. ("NASD Regulation"). X appeared and was accompanied by his attorney, and by his proposed supervisor ("the Proposed Supervisor"), a general securities principal. Counsel for the Sponsoring Firm also appeared.

X has been employed in the securities industry with a variety of firms since 1985. X was employed as a general securities representative at Firm A (from 1989 through 1994); Firm B (from 1994 through 1995); Firm C (in 1995); and the Firm D (from 1995 through 1996). The misconduct that created his statutory disqualification occurred while X was employed by Firm A. X testified at the hearing that he has not been engaged in the securities business since the disqualifying event.

X became subject to a statutory disqualification after pleading nolo contendere to one criminal count of fraudulent sale of securities investments in a Circuit Court in 1996. The criminal information against X alleged that, while employed at Firm A, X violated Sections 517.301(1)(a)3 and 517.302(1), Florida Statutes, by engaging in excessive trading of United States Treasury Strips in the a County account for the purpose of earning commissions. The Circuit Court Judge entered an order withholding an adjudication of guilt and ordering X to complete five years' probation, pay \$103.72 per month

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.

toward the cost of his probationary supervision, pay \$6,500 in court costs, and pay a \$10,000 fine. Firm A paid the court-ordered fees and fine.

X's counsel argued that X has not actually been convicted of a criminal offense because the judge presiding over X's case exercised his discretion to withhold an adjudication of guilt against X. Citing state Statute 948.01(2), X's counsel contended that the judge was authorized to "either adjudge the defendant to be guilty or to stay and withhold the adjudication of guilt. . . ." According to X's counsel, since the judge chose to withhold the adjudication of guilt, X has not been and cannot later be convicted of a criminal offense for the conduct involved. In response to direct questioning, X's counsel opined that even if X violated the terms of his probation, X would be subject to punishment for a probation violation but not for the underlying charge of securities fraud.

We disagree. By its own terms, the judge's 1996 sentencing order places X on notice that "if you violate any of the conditions of your probation, you may be arrested and the Court may revoke your probation, adjudge you guilty, and impose any sentence which it might have imposed before placing you on probation" (emphasis added). Thus, as with many other states' deferred adjudication statutes, until X successfully completes his probation, he is under constant threat of an adjudication of guilt. When X's probation terminates, his disqualification will be removed.

The Sponsoring Firm has been a member of the NASD since 1993 as a broker-dealer engaged in sales of fixed income securities products to institutional clients. The Sponsoring Firm clears on a fully disclosed basis and employs four registered principals, 39 registered representatives and has three branch offices. The Sponsoring Firm proposes that X's functions as a registered representative be directly supervised by the Sponsoring Firm's sales manager and chief compliance officer ("the Proposed Supervisor"). X's duties will primarily consist of buying or selling fixed-income securities to institutional clients on a pre-approved basis. The Proposed Supervisor supervises six people at the Sponsoring Firm's home office in Florida, and has been a registered principal since 1993. He has not been the subject of disciplinary proceedings.

At the hearing and in written submissions the Sponsoring Firm outlined the following supervisory plan:

- (1) X's duties will consist of buying and selling for institutional accounts which have been pre-approved by telephone, mail or fax;
- (2) X's office will be located in close proximity to the Proposed Supervisor's;
- (3) All contact with customers will be on a pre-approved basis;
- (4) X will be made to keep a log of all contacts to be reviewed once a week by a senior level manager.

The Sponsoring Firm employs no other individuals who are subject to a statutory disqualification and no familial relationship exists between X and the Proposed Supervisor. The Sponsoring Firm's 1997 examination was filed without action.

After careful review of the entire record in this matter, we conclude that the application of X for association with a Sponsoring Firm as a general securities representative should be denied. X has just recently begun serving a five-year probation period for committing a serious, securities related offense. It is inconsequential that X entered a plea of nolo contendere, as opposed to a plea of guilty, to this charge. Under the Investment Company Act of 1940 and the Investment Advisors Act of 1940, the definition of a conviction includes a plea of nolo contendere. As explained above, it is equally inconsequential that X received a deferred adjudication. We find that, in the interests of the public and protection of investors, the application of the Sponsoring Firm to employ X should be denied.

On Behalf of the National Adjudicatory Council,

Joan C. Conley, Corporate Secretary