

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of
the Continued Association of

X¹

as a

General Securities Representative

with

The Sponsoring Firm

Redacted Decision

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

SD12009

Date: 2012

I. Introduction

On November 30, 2009, the Sponsoring Firm submitted a Membership Continuance Application (“MC-400” or “the Application”) with the Department of Registration and Disclosure (“Registration and Disclosure”) at the Financial Industry Regulatory Authority (“FINRA”).² The Application seeks to permit X, a person subject to a statutory disqualification, to continue to associate with the Sponsoring Firm as a general securities representative. A hearing was not held in this matter. Rather, pursuant to FINRA Rule 9523, FINRA’s Department of Member Regulation (“Member Regulation”) recommended that the Chair of the Statutory Disqualification Committee, acting on behalf of the National Adjudicatory Council (the

¹ The names of the Statutorily Disqualified individual, the Sponsoring Firm, the Proposed names of the Supervisor, and other information deemed reasonably necessary to maintain confidentiality have been redacted.

² The Sponsoring Firm previously filed a Membership Continuance Application on behalf of X in October 2005 and, in 2006, Member Regulation recommended that the application be approved pursuant to FINRA Rule 9523. The Chair of the Statutory Disqualification Committee, however, had questions for the Sponsoring Firm and X concerning the application. The Sponsoring Firm and X answered most of the questions posed to them, but there was a delay in responding to questions concerning X’s failure to disclose certain matters on his Uniform Application for Securities Industry Registration or Transfer (“Form U4”), described in Part III.A.3 *infra*. Although the Sponsoring Firm and X eventually provided the information, Member Regulation requested that the Sponsoring Firm re-file a revised application with updated information.

“NAC”), approve X’s proposed continued association with the Sponsoring Firm pursuant to the terms and conditions set forth below.

For the reasons explained below, we approve the Sponsoring Firm’s Application to permit X to continue to associate with the Sponsoring Firm as a general securities representative.

II. The Statutorily Disqualifying Event

X is statutorily disqualified because in 2005, a District Court of State 1 convicted him of a felony for driving under the influence (“DUI”). This was a felony because X had two prior misdemeanor convictions for DUI, one of which occurred within 10 years.³ The court sentenced X to 12 months of probation, and 10 days in jail followed by 80 days of house arrest. The court also fined X \$1,500 and ordered that he pay costs and fees. X completed his sentence and paid all fines, costs, and fees.

In 2012, the court issued an Order of Expungement related to X’s felony conviction. As a result, X “shall be treated as not having been arrested and convicted” of a felony DUI. State 1 law, however, requires that notwithstanding the expungement, X disclose the arrest and the conviction in response to any question contained in an application for registration as a broker-dealer. Thus, although the court set aside X’s conviction, he remains convicted of a felony and is statutorily disqualified under Section 3(a)(39)(F) of the Securities Exchange Act of 1934 (“Exchange Act”).

III. Background Information

A. X

1. Employment History

X qualified as a general securities representative in October 1986 and passed the Uniform Securities Agent State Law Examination in November 1986. X also passed the Investment Advisors Law Exam in March 2003. X has previously been associated with four firms from July 1986 until October 2002. X has been employed at the Sponsoring Firm since October 2002.

2. Customer Complaints and Liens

In 2002, customers LH and MH filed a complaint against X that alleged unsuitable recommendations. They sought damages of \$250,000. The customers voluntarily dismissed the complaint. Also in 2002, customers DH and JH filed a complaint against, among others, X that

³ In 1993, X was convicted for DUI and sentenced to participate in a diversion plan. In 1997, X was convicted for DUI and sentenced to two years of probation and ordered to complete a 60-day treatment program. Both convictions occurred in State 1 and were misdemeanors. X successfully completed his probation and the treatment program.

alleged unsuitable recommendations. The customers claimed \$35,000 in damages. This complaint resulted in a settlement, although all claims against X were dismissed with prejudice.

In addition, X has had three tax liens levied against him. In 2007, the State 1 Department of Revenue obtained a judgment lien against X in the amount of \$11,655. In 2010, the State 1 Department of Revenue obtained a judgment lien against X in the amount of \$65,513. Also in 2010, the IRS filed a lien against him in the amount of \$44,984. All of these liens have been satisfied.

3. Failure to Timely Disclose Felony Charge and Conviction

As described above, X was convicted of his disqualifying felony in 2005, and he was charged with this felony on 2004. X, however, did not amend his Form U4 to disclose these events until 2005.⁴ With respect to X's failure to timely disclose the felony charge, he states that he did not understand that the charge involved a felony because the citation/notice to appear did not reference the charge as a felony. With respect to X's failure to timely disclose his felony conviction, the record shows that X sought advice from attorneys. He spoke to the first attorney after his conviction but prior to sentencing, and the attorney advised him that he was not a convicted felon because the state was required to prove at sentencing his prior DUI convictions. X consulted with another attorney after sentencing, and he then amended his Form U4 to reflect the felony conviction. Member Regulation states that FINRA investigated the matter but declined to bring any action against X for his late disclosures.

B. The Sponsoring Firm

The Sponsoring Firm has been a FINRA member since May 1985. The Sponsoring Firm maintains 15 branch offices, five Offices of Supervisory Jurisdiction ("OSJ"), and employs 58 registered employees and 21 non-registered employees. The Sponsoring Firm engages in a general securities business.

In 2007, FINRA accepted from the Sponsoring Firm a Letter of Acceptance, Waiver and Consent ("AWC"), which found that the Sponsoring Firm failed to timely make filings subject to Exchange Act Rule 15c2-12 and failed to report one eligible transaction to FINRA's Trade Reporting and Compliance Engine ("TRACE"). FINRA censured the Sponsoring Firm and fined it \$10,000.

FINRA's most recent examination of the Sponsoring Firm was a 2012 sales practice exam that resulted in no findings by FINRA staff. In 2008, FINRA issued the Sponsoring Firm a Cautionary Action after a routine examination. The Cautionary Action cited the Sponsoring

⁴ Pursuant to Article V, Section 2(c) of NASD's By-Laws, an associated person was required to keep his Form U4 current at all times and amend the form within 30 days after learning of facts or circumstances giving rise to the amendment. If the amendment involved a statutory disqualification, an associated person was required to amend his Form U4 within 10 days of the disqualification. Article V, Section 2(c) of FINRA's By-Laws contains the same requirements.

Firm for failing to timely send Uniform Termination Notices for Securities Industry Registration to terminated employees, utilizing electronic storage media without properly notifying FINRA and failing to engage an independent third party to meet the requirements of Exchange Act Rule 17a-4(f)(3)(vii), and failing to accurately report information on two filings pursuant to MSRB Rule G-36. The Sponsoring Firm provided a written response stating that it had addressed the deficiencies noted.

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

IV. X's Proposed Business Activities and Supervision

The Sponsoring Firm proposes that X will continue to work from the Sponsoring Firm's branch office in City 1, State 2, as a "salesman to both retail and institutional clients."⁵ The Sponsoring Firm proposes that it will continue to compensate X on a commission basis.

The Sponsoring Firm also proposes that the Proposed Supervisor will continue to serve as X's primary supervisor. The Proposed Supervisor has supervised X since September 2006. The Proposed Supervisor entered the securities industry in 1983, when he became registered as a municipal securities representative. He registered as a municipal securities principal in July 1984, a general securities representative in September 1997, and a general securities principal in May 2002. The Proposed Supervisor also passed the Uniform Securities Agent State Law Examination in December 1986. The Proposed Supervisor has been employed with the Sponsoring Firm since July 1997. The Proposed Supervisor works from the Sponsoring Firm's City 1 office, where he serves as that office's managing director and compliance branch manager. The Proposed Supervisor currently supervises nine individuals.

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

V. Member Regulation's Recommendation

Member Regulation recommends approval of the Sponsoring Firm's request for X to continue to associate with the Sponsoring Firm as a registered representative, subject to the terms and conditions of heightened supervision described below.

VI. Discussion

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

⁵ X states that since 2009, he has specialized in marketing high-grade bonds to banks and money managers, and thus is now "serving a predominantly institutional client base."

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.⁶ We assess the totality of the circumstances in reaching a judgment about X's future ability to work in the securities industry 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.

For the reasons set forth below, we conclude that X's participation in the securities industry, subject to the supervisory terms and conditions set forth below, will not present an unreasonable risk of harm to the market or investors.

We acknowledge the seriousness of X's criminal conviction. We note, however, that his felony conviction did not involve securities or fraudulent misconduct and occurred more than seven years ago. Further, we recognize that a State 1 court sentenced X for that offense and X complied with all aspects of that sentence. Indeed, in 2012, the court expunged X's conviction and arrest. The record also reflects that X accepted responsibility for his DUI violations and sought treatment after his arrest and conviction.

We also acknowledge that X failed to timely update his Form U4 in connection with his felony charges and conviction. We note, however, that the record supports X's understanding that the charge did not involve a felony and that he consulted with attorneys in connection with his disclosure obligations subsequent to his conviction. FINRA investigated X's late disclosures and decided not to pursue the matter further. Moreover, X timely disclosed the tax liens and customer complaints, and the proposed plan of heightened supervision contains provisions designed to prevent any such failures in the future. Other than X's late disclosures of the felony charge and conviction on his Form U4, we are not aware of any intervening misconduct by X.

X's Proposed Supervisor, has worked in the securities industry for more than 25 years and has an unblemished regulatory history. He has been employed with the Sponsoring Firm since 1997. Although the Proposed Supervisor currently supervises nine employees, he has served as X's primary supervisor for six years under heightened supervision without incident. Based on the Proposed Supervisor's tenure in the industry, his lack of disciplinary history, and his supervision of X without incident since 2006, it appears that he would be a capable and qualified supervisor to oversee X's activities with the Sponsoring Firm pursuant to the heightened plan of supervision described below. In addition, the Sponsoring Firm has been the subject of only one formal regulatory action (the 2007 AWC) and corrected all deficiencies noted in the 2008 Cautionary Action. Thus, the Sponsoring Firm appears capable to supervise adequately a statutorily disqualified individual such as X.

⁶ See *Frank Kufrovich*, 55 S.E.C. 616, 625-26 (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).

We are satisfied that the following heightened supervisory procedures will enable the Sponsoring Firm to reasonably monitor X's activities on a regular basis:⁷

- *1. The written supervisory procedures for the Sponsoring Firm will be amended to state that the Proposed Supervisor will be X's primary supervisor;
- *2. X will not act in a supervisory capacity;
- 3. X will not maintain any discretionary accounts;
- 4. The Proposed Supervisor will supervise X on-site at the Sponsoring Firm's branch office, located in City 1, State 2;
- *5. On a quarterly basis, X will certify in writing to the Proposed Supervisor that he has read the Sponsoring Firm's current Code of Conduct and other applicable Sponsoring Firm policies pertaining to his obligations to disclose legal and regulatory matters to the Sponsoring Firm, and that he fully understands his obligations thereunder. The Proposed Supervisor will maintain copies of X's certifications and will keep them segregated for ease of review during any statutory disqualification examination;
- *6. On a quarterly basis, X will certify in writing to the Proposed Supervisor that he is in full compliance with all of his disclosure reporting obligations pursuant to FINRA's rules. The Proposed Supervisor will maintain copies of X's certifications and will keep them segregated for ease of review during any statutory disqualification examination;
- *7. The Proposed Supervisor will promptly alert the Sponsoring Firm's Regional Compliance Officer and Legal Department of any indication that X is under the influence of alcohol while at work, including but not limited to unexplained lateness or absences, or other erratic behavior;
- *8. The Proposed Supervisor will review and initial all of X's trade and check blotters weekly. The Proposed Supervisor will keep copies of the reviewed trade and check blotters segregated for ease of review during any statutory disqualification examination;
- *9. The Proposed Supervisor will review and pre-approve each securities account, prior to the opening of the account by X. Account paperwork will be documented as approved with a date and signature and maintained at the branch office in City 1, as well as the Sponsoring Firm's home office. The

⁷ The items that are denoted by an asterisk are proposed heightened supervisory conditions for X and are not standard operating procedures of the Sponsoring Firm.

Proposed Supervisor will keep copies of the account paperwork segregated for ease of review during any statutory disqualification examination;

- *10. The Proposed Supervisor will review X's incoming written correspondences (which will include e-mail communications) upon its arrival and will review X's outgoing correspondence before it is sent;
- *11. For the purposes of client communication, X will only be allowed to use an e-mail account that is held at the Sponsoring Firm, with all emails being filtered through the Sponsoring Firm's e-mail system. If X receives a business related e-mail message, in another e-mail account outside the Sponsoring Firm, he will immediately deliver that message to the Sponsoring Firm's e-mail account. Also, X will inform the Sponsoring Firm of all outside e-mail accounts which he maintains and will provide the Sponsoring Firm access to the accounts upon request. The e-mail messages are to be preserved and kept segregated for ease of review during any statutory disqualification examination;
- *12. The Proposed Supervisor must certify quarterly (March 31st, June 30th, September 30th, and December 31st) each year to the Compliance Department of the Sponsoring Firm, that he and X are in compliance with all of the above conditions of heightened supervision to be accorded X;
- *13. All complaints pertaining to X, whether verbal or written, will be immediately referred to the Proposed Supervisor for review, and then to the Sponsoring 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 will be kept segregated for ease of review during any statutory disqualification examination;
- 14. If the Proposed Supervisor is to be on vacation or out of the office for an extended period, Firm Employee 1⁸ will act as X's interim supervisor; and
- *15. 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.

⁸ Firm Employee 1 is the Sponsoring Firm's chief compliance officer. Firm Employee 1 became registered as a general securities representative in June 1997 and as a general securities principal in September 2009. The record shows no disciplinary or regulatory proceedings, complaints, or arbitrations against Firm Employee 1.

FINRA certifies that: (1) X meets all applicable requirements for the proposed employment; (2) the Sponsoring Firm represents that it is not registered with any other self-regulatory organization; (3) the Sponsoring Firm has represented that X, the Proposed Supervisor, and Firm Employee 1 are not related by blood or marriage; and (4) the Sponsoring Firm does not employ any other statutorily disqualified individuals.

VII. Conclusion

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

Marcia E. Asquith
Senior Vice President and Corporate Secretary