BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of the Continued Association of X[1] as a General Securities Representative with The Sponsoring Firm	Redacted Decision Notice Pursuant to Section 19(d) Securities Exchange Act of 1934 SD12008 Dated: 2012

I. Introduction

On August 17, 2009, the Sponsoring Firm filed a Membership Continuance Application ("MC-400" or "the Application") with FINRA's Department of Registration and Disclosure ("RAD"). The Application requests that FINRA permit X, a person whom RAD determined is statutorily disqualified, to continue to associate with the Sponsoring Firm as a general securities representative. In November 2011, a subcommittee ("Hearing Panel") of FINRA's Statutory Disqualification Committee held a hearing on the matter. X appeared at the hearing, accompanied by counsel, Attorney 1, a general securities principal at the Firm, Firm Employee 1, and the Firm's chief compliance officer, the Proposed Supervisor.[2] FINRA Employee 1, FINRA Attorney 1, FINRA Attorney 2, and FINRA Attorney 3 appeared on behalf of FINRA's Department of Member Regulation ("Member Regulation").

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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] The Sponsoring Firm initially proposed that Firm Employee 1 would supervise X from its City 1, State 2 branch office. Pursuant to a letter dated in 2012, the Sponsoring Firm informed FINRA that due to certain personal issues, it is no longer proposing that Firm Employee 1 serve as X's supervisor under the Sponsoring Firm's heightened supervisory plan. Instead, the Sponsoring Firm now proposes that X will work at its main office in City 2, State 3 and that the Proposed Supervisor will serve as X's on site supervisor under the heightened supervisory plan.

For the reasons explained below, we deny the Firm's Application.[3]

II. X Is Statutorily Disqualified

As an initial matter, X disputes that he is statutorily disqualified. X also argues that, if he is statutorily disqualified, FINRA unfairly and retroactively applied to him a revised definition of statutory disqualification subsequent to the underlying misconduct at issue. Member Regulation argues that X is statutorily disqualified and, at the hearing, argued that FINRA properly applied its rules. As discussed below, we find that X is statutorily disqualified and that FINRA did not unfairly and retroactively apply to him the definition of statutory disqualification.

A. Background

Section 604 of the Sarbanes-Oxley Act, enacted in July 2002, expanded the definition of "statutory disqualification" contained in Section 3(a)(39) of the Securities Exchange Act of 1934 ("Exchange Act") to include several additional statutorily disqualifying events. Among other things, the Sarbanes-Oxley Act amended the Exchange Act's existing definition of statutory disqualification to include an individual who is subject to a final order of a state securities commission or state authority that supervises or examines banks that either: (i) "[b]ars such person from association with an entity regulated by such commission[;]" or (ii) "[c]onstitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative or deceptive conduct." 15 U.S.C. § 78o.[4]

Until July 2007, NASD's By-Laws tracked most of the language in Exchange Act Section 3(a)(39), but they did not include the additional categories of disqualification added by the Sarbanes-Oxley Act in 2002. In connection with the formation of FINRA, the Commission approved amendments to NASD's By-Laws that harmonized its definition of statutory disqualification with the Exchange Act's more expansive definition.[5] *See Order Approving*

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[3] Pursuant to FINRA Rule 9524(a)(10), the Hearing Panel submitted its written recommendation to the Statutory Disqualification Committee. The Statutory Disqualification Committee considered the Hearing Panel's recommendation and presented a written recommendation to the National Adjudicatory Council.

[4] Exchange Act Section 3(a)(39)(F) provides that:

> A person is subject to a "statutory disqualification" with respect to . . . association with a member of, a self-regulatory organization, if such person—(F) has committed or omitted any act or is subject to an order or finding enumerated in subparagraph . . . (H) . . . of paragraph (4) of section 15(b).

[5] As a result of the amendment, Article III, Section 4 of FINRA's By-Laws provides that, "[a] person is subject to a 'disqualification' with respect to . . . association with a member, if such person is subject to any 'statutory disqualification' as such term is defined in Section 3(a)(39) of the [Exchange] Act."

Proposed Rule Change to Amend the By-Laws of NASD to Implement Governance and Related Changes, Exchange Act Rel. No. 56145, 2007 SEC LEXIS 1640 (July 26, 2007), as amended by Exchange Act Rel. No. 56145A, 2008 SEC LEXIS 1270 (May 30, 2008).

The harmonization of FINRA's and the Exchange Act's definition of statutory disqualification caused all individuals subject to statutory disqualification under the Exchange Act to be subject to FINRA's then-existing procedures governing eligibility proceedings.[6] FINRA, with the Commission's approval, subsequently amended its processes and procedures to effectively address the additional individuals who became statutorily disqualified as a result of the Sarbanes-Oxley Act. *See Order Approving Proposed Rule Change to Amend the FINRA Rule 9520 Series Regarding Eligibility Procedures for Persons Subject to Certain Disqualifications*, Exchange Act Rel. No. 59586, 2009 SEC LEXIS 744 (Mar. 17, 2009). FINRA's revised procedural rules, which became effective in June 2009, required that only certain individuals statutorily disqualified as a result of the Sarbanes-Oxley Act file with RAD applications seeking relief from their ineligibility. *See FINRA Regulatory Notice 09-19*, 2009 FINRA LEXIS 52 (Apr. 2009). FINRA explained that, absent changes to its procedural rules, "all persons subject to any of the additional categories of disqualification would be required to obtain approval from FINRA to enter or remain in the securities industry." *Id.* at *8. The Commission stated that the changes to FINRA's rules governing eligibility proceedings should allow FINRA "to integrate filings mandated by the revised definition of disqualification into established programs that monitor subject persons."[7] 2009 SEC LEXIS 744, at *9.

In 2009, RAD notified the Sponsoring Firm that X was subject to statutory disqualification and the Sponsoring Firm should file a Membership Continuance Application if it wanted X to continue to associate with it.

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[6] At all times, NASD's and FINRA's eligibility procedures referenced the definition of statutory disqualification in their respective by-laws. *Compare* NASD Rule 9521(a) (stating that the Rule 9520 Series provides procedures for a person to become or remain associated with a member, notwithstanding the existence of a disqualification as defined in NASD's by-laws), *available at* http://finra.complinet.com/en/display/display.html?rdid=2403_ record_id=10888element_id=7826highlight=9521#r10888, *with* FINRA Rule 9521(a) (referencing the definition of disqualification contained in FINRA's by-laws).

[7] FINRA's procedures addressing how to process individuals disqualified under the expanded definition of statutory disqualification were not revised and approved by the Commission until 2009. Nevertheless, in July 2003, FINRA amended the Uniform Application for Securities Industry Registration or Transfer ("Form U4") to require the reporting of the additional disqualifying events created under the Sarbanes-Oxley Act. FINRA stated that the amendments would, among other things, "elicit reporting of regulatory actions that may cause an individual to be subject to a statutory disqualification under the expanded definition of disqualification in Section 15(b)(4)(H) of the Exchange Act, created by the passage of the Sarbanes-Oxley Act." *See NASD Notice to Members 03-42* (July 2003), *available at* http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p003209.pdf.

It is against this backdrop that we address the preliminary issues raised by X.

B. The Underlying Misconduct and State Order at Issue

In 2004, State 1's Department of Banking, Insurance, Securities, and Health Care Administration (the "State 1 Department") entered against X an Order Imposing Administrative Sanctions and Consent to Same (the "State 1 Order"). The State 1 Order: (1) censured X; (2) ordered that he permanently cease and desist from violating State 1 law; (3) prohibited X from seeking registration in State 1 as a broker-dealer sales representative or an investment adviser representative without prior written consent from the State 1 Department, which may be granted or withheld in the State 1 Department's sole discretion; (4) prohibited X from supervising State 1 registered broker-dealer sales representatives or investment adviser representatives without prior written consent from the State 1 Department, which may be granted or withheld in its sole discretion; and (5) fined him $25,000.

The bases for the State 1 Order were findings that, from 2002 until 2003, X engaged in unauthorized transactions in customer accounts, made unsuitable recommendations to customers, and regularly utilized high pressure sales tactics. Before the Hearing Panel, X explained that his employing firm became the subject of regulatory scrutiny "due to other brokers' actions." X claimed that the State 1 Department identified a customer, jointly serviced by X and another registered representative, Y, who claimed that there was unauthorized activity in his account. X further elaborated that he was the senior registered representative on the account, but he did not do much business in State 1. X claimed that Y spoke to the customer at issue, gave X the order in question, and X simply filled out the order ticket. X testified that he did not take the order from the customer. During an investigative interview conducted by the State 1 Department in 2003, however, X testified that he spoke to the customer and recommended the securities at issue.[8]

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[8] Approximately one month after the hearing in this matter, Member Regulation filed a motion to introduce the transcript of the 2003 interview when it produced the State 1 order sanctioning Y (as ordered by the Hearing Panel at the hearing). Member Regulation sought to introduce this transcript to rebut X's testimony at the hearing that he merely filled out the customer's order ticket and had no additional involvement with the customer.

X objected, and he argued that permitting the transcript to be introduced "merely serves to create the potential for serious prejudice" and Member Regulation should not be permitted to "reopen" the record subsequent to the hearing. We have considered the parties' arguments on this matter, and we admit this evidence into the record solely for the purpose of considering X's differing explanations of the events surrounding the State 1 Order. *See Jan Biesiadecki*, 53 S.E.C. 182, 185 (1997) (holding that FINRA correctly adhered to its long-standing policy of prohibiting collateral attacks on underlying disqualifying events).

After consulting with his attorney, X agreed to the terms of the State 1 Order to resolve the matter as a "business decision." X claims that he did not understand that the State 1 Order would render him statutorily disqualified.

C. The State 1 Order Is a Final Order Based upon Fraudulent, Manipulative, or Deceptive Conduct

We must first determine whether the State 1 Order is disqualifying under Exchange Act Section 3(a)(39). We find that it is.

The State 1 Order constitutes a final order based on violations of laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct under Exchange Act Section 15(b)(4)(H)(ii). Pursuant to the Uniform Disciplinary Action Reporting Form ("Form U6") filed by State 1 in connection with the State 1 Order in 2004, State 1 classified its order as a final order based on violations of laws or regulations prohibiting fraudulent, manipulative, or deceptive misconduct.[9] Generally, FINRA weighs a state's determination, as indicated on the state's Form U6, in considering whether an individual violated a law prohibiting fraudulent, manipulative, or deceptive conduct. *See Membership Continuance Application of Applicant Firm A*, Application No. 20090173549, 2010 FINRA Discip. LEXIS 11, at *7 n.4 (FINRA NAC Aug. 18, 2010).[10]

Moreover, the State 1 statutes violated by X, and the nature of X's underlying misconduct, further demonstrate that the State 1 Order constitutes a final order based upon violations of laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct. State 1 Regulation S-91-1, Section 3.03 provides that "[e]ffecting a transaction in the account of a customer without authority to do so" is an unethical or dishonest practice in the securities business.[11] "Recommending to a customer the purchase, sale or exchange of any security without reasonable grounds to believe that such transaction or recommendation is suitable" is also an unethical or dishonest practice. *See* State 1 Regulation S-91-1, Section 3.05. Stat e 1's regulations further provide that:

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[9] Question 11 of the Form U6 asks: "Does the order constitute a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct?" State 1 answered in the affirmative.

[10] Although X disclosed the State 1 Order on his Form U4, he did not indicate that it was an order based upon violations of laws that prohibit fraudulent, manipulative, or deceptive conduct.

[11] At the time the State 1 Department entered the State 1 Order, the State 1 statute pursuant to which the relevant regulations were promulgated provided that the State 1 Department's commissioner could, among other things, suspend or revoke the securities registration of a registered person or bar such person from associating with a broker-dealer if he "has engaged in unethical or dishonest practices in the securities business." *See* 9 V.S.A. 4221a(a)(8).

> Engaging or aiding in boiler room operations or high pressure tactics in connection with the solicitation of a sale or purchase of a security by means of an intensive telephone campaign or unsolicited calls to persons not known by, nor having an account with, the sales representative or broker-dealer represented by the sales representative, whereby the prospective purchaser is encouraged to make a hasty decision to buy, irrespective of his or her investment needs and objectives is an unethical or dishonest practice in the securities business.

State 1 Regulation S-91-1, Section 3.06.

The State 1 Order found that X violated each of these provisions in numerous ways. Specifically, the State 1 Order found that X entered two transactions in a customer's account without consulting the customer and obtaining his approval for each transaction. The State 1 Order found that X did not contact the customer (and, in fact, could not have contacted the customer because the customer was on a hunting trip and unreachable). The State 1 Order also found that X recommended securities to customers without reasonable grounds to believe that they were suitable by purchasing lead cards containing the names, addresses, and telephone numbers of business owners, and then "cold calling" these leads. The State 1 Order further found that X almost always recommended to the customers small cap, aggressive growth stocks without considering the customers' investment experience, investment objectives, or financial resources. Further, the State 1 Order found that X "regularly exerted high pressure on his customers and [l]eads to make hasty decisions to purchase the securities that he was recommending." X, through repeated, rehearsed telephone calls, "was able to coerce customers and [l]eads to make securities purchases and, on many occasions, gathered enough information from [l]eads to enable him to open accounts in their names and then [to] execute[] unauthorized transactions in those accounts."

Because the State 1 regulations at issue prohibit fraudulent, manipulative, and deceptive practices, such as the use of "boiler room" sales tactics, and given the nature of X's misconduct found by State 1 (which included unauthorized transactions and the use of high pressure sales tactics to coerce customers into making securities purchases or open accounts using the names of sales leads and then making unauthorized purchases in those accounts), we find that the State 1 Order was disqualifying under Exchange Act Section 15(b)(4)(H)(ii). *See SEC v. Wolfson*, 539 F.3d 1249, 1253 n.6 (10th Cir. 2008) ("[T]he term 'boiler room' is typically used to describe a telemarketing operation in which salespeople call lists of potential investors in order to peddle speculative or fraudulent securities. A broker using so-called 'boiler-room tactics' generally gives customers a high-pressure sales pitch containing misleading information about the nature of the investment, as well as the broker's own commission on the sale."); *SEC v. Hasho*, 784 F. Supp. 1059, 1110 (S.D.N.Y. 1992) (finding that defendants' unauthorized trades in connection with boiler room operations violated the antifraud provisions of the securities laws because they were the result of material deception, misrepresentation or non-disclosure); *Best Sec., Inc.*, 39 S.E.C. 931, 933-34 (1960) (finding that broker engaged in an intensive campaign of selling stock in volume "by the use of whatever representations it thought would produce the greatest number of sales in the shortest time" in violation of anti-fraud provisions and the standards of the profession); *see also* Louis Loss & Joel Seligman, *Securities Regulations*, § 9-C-3 (3d ed. 2006) ("In the Commission's view, 'boiler rooms' fell under the ban of the fraud provisions.").

X argues that the meaning of fraudulent, manipulative, or deceptive conduct is unclear. In support, he points to the Commission's recent request for comment regarding similar language set forth in Section 926(2)(A)(ii) of the Dodd-Frank Act of 2010 (which disqualifies certain individuals from participating in private placement offerings). In that request for comment, the Commission stated that it had been urged to differentiate between mere technical violations and intentional or more egregious conduct when interpreting the meaning of fraudulent, manipulative, or deceptive conduct in the context of private placement offerings. *See Disqualification of Felons and Other "Bad Actors" from Rule 506 Offerings*, Securities Act Rel. No. 33-9211, 2011 SEC LEXIS 1820, at *49-50 (May 25, 2011). The Commission stated that "[w]e understand that there may be concerns that this language could be interpreted or applied very broadly, and in particular that under some state laws and regulations, conduct that some may consider to be a 'technical' violation might be defined as fraudulent, manipulative or deceptive." *See id.* at *49.

We do not find X's argument persuasive. To the extent that this request for comment is relevant to whether X is statutorily disqualified under the Exchange Act, the misconduct underlying the State 1 Order was not "technical" in nature. Rather, it involved serious misconduct and findings that X engaged in unauthorized transactions, made unsuitable recommendations, and regularly used high pressure sales tactics and coerced customers into purchasing securities. The Commission's concerns regarding potentially overbroad interpretations of what constitutes fraudulent, manipulative, or deceptive conduct for private placements are simply not relevant to the circumstances before us and X's misconduct underlying the disqualifying State 1 Order.

X also argues that Member Regulation did not specifically identify the State 1 Order as a final, disqualifying order based upon laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct. Rather, X asserts that Member Regulation asserted only that the State 1 Order was a final order barring X, and that it would be unfair to permit Member Regulation to assert another reason why the State 1 Order is disqualifying. We disagree.

First, we are not bound by Member Regulation's characterization of an order or event as statutorily disqualifying and the alleged basis for an individual's statutory disqualification, which are legal issues that we may raise and address as an adjudicator. *See Perez v. United States*, 830 F.2d 54, 58 (5th Cir. 1987) ("A trial court can sua sponte address a legal issue raised by neither party."); *Brown v. Termplan, Inc.*, 693 F.2d 1047, 1048-49 (11th Cir. 1982) (same)); *see also* FINRA Rule 9524(a)(3)(4) (providing that the Hearing Panel may order the parties to supplement the record with any information it deems necessary). Indeed, to promote FINRA's mission to protect the investing public, we may independently determine whether an individual, such as X, is statutorily disqualified under the Exchange Act on grounds other than those argued by the parties.

Second, X was not unfairly prejudiced by Member Regulation's apparent initial failure to identify the State 1 Order as a final order based upon fraudulent, manipulative, or deceptive conduct. The Form U6, filed by State 1 in 2004, indicated that the State 1 Order was a final order based upon violations of regulations or statutes prohibiting such conduct and, therefore, put X on notice as to the basis for his statutory disqualification. Moreover, at the onset of these

proceedings in 2009, RAD identified the State 1 Order as the triggering disqualifying event. Thus, X has been on notice for several years that FINRA based its determination that X is statutorily disqualified on the State 1 Order. Contrary to X's argument, FINRA's identification of the State 1 Order as the grounds for X's disqualification under Exchange Act Section 3(a)(39) satisfied the requirement contained in FINRA Rule 9522(a) that FINRA staff specify in writing the grounds for his disqualification.

Further, in 2011, the Hearing Panel sua sponte ordered the parties to address whether X is disqualified because he is the subject of a final order barring him from associating with a broker-dealer, or because he is the subject of a final order based on violations of laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct. The parties each filed multiple briefs on the matter and Member Regulation expressly argued that the State 1 Order is disqualifying under both Exchange Act Sections 15(b)(4)(H)(i) and (ii). X had ample opportunity to argue the legal issue of whether the State 1 Order was disqualifying under either Exchange Act Section 15(b)(4)(H)(i) or (ii), and he in fact made such arguments in briefs filed with the Hearing Panel.[12] X was afforded a full opportunity to argue these matters, and he was not unfairly prejudiced.

For all of these reasons, we find that the State 1 Order is disqualifying because it is a final order based upon fraudulent, manipulative, or deceptive conduct.[13]

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[12] In his briefs, X argued that permitting Member Regulation to assert a new basis for disqualification more than two years after FINRA issued notice of the disqualification "would be akin to allowing a prosecutor to add new charges against a defendant during his opening statement at trial." We reject this argument. First, FINRA eligibility proceedings are not criminal proceedings. *See Pacific On-Line Trading & Sec., Inc.*, 56 S.E.C. 1111, 1123 n.21 (2003) (holding that FINRA proceedings are not criminal matters). Second, the Hearing Panel ordered the parties to brief this issue in July 2011, more than four months prior to the hearing on this matter.

[13] In light of our findings that the State 1 Order is disqualifying because X's misconduct involved violations of State 1 laws prohibiting fraudulent, manipulative, or deceptive conduct, we need not decide whether the State 1 Order is also disqualifying because it is a final order barring X. To promote judicial efficiency, Member Regulation should in the future identify, as early in an eligibility proceeding as practicable, *all* statutory bases pursuant to which it asserts an order is disqualifying where an applicant disputes that the order is disqualifying.

D. FINRA Did Not Retroactively Impose upon X the Definition of Statutory Disqualification or Rules Concerning Eligibility Proceedings

Having determined that the State 1 Order rendered X statutorily disqualified, we now address X's argument that FINRA retroactively applied the definition of statutory disqualification, which X argues makes this entire proceeding unfair.

Generally, without clear evidence of a statute's intent, a presumption exists against statutory retroactivity. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 264 (1994). "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Id.* at 265. With respect to federal statutes, courts first ask whether Congress has expressed its intent to apply the statute retroactively. *Id.* at 280. Absent such intent, courts must determine whether the statute would have a retroactive effect. Factors courts consider in making this determination include whether the statute would impair rights a party possessed at the time he acted, increase liability for past conduct, or impose new duties concerning transactions already completed. *Id.* "Changes in procedural rules may often be applied . . . without raising concerns about retroactivity." *Id.* at 275. Rules of procedure regulate secondary conduct, and parties hold "diminished reliance interests in matters of procedure." *Id.* For example, intervening statutes conferring jurisdiction on a particular tribunal have regularly been applied whether or not the tribunal possessed jurisdiction when the underlying conduct occurred. *Id.* at 274.

We reject X's retroactivity arguments. First, Congress amended the definition of statutory disqualification set forth in Exchange Act Section 3(a)(39) two years *prior* to entry of the State 1 Order in 2004. Thus, at the time of X's underlying misconduct, from 2002 until 2003, and at the time State 1 entered the State 1 Order in 2004, the existing Exchange Act provisions at issue rendered X statutorily disqualified. X's professed ignorance of the law or the effect of entry of the State 1 Order is irrelevant to our determination that retroactivity arguments are inapplicable to X's disqualified status under Exchange Act Section 3(a)(39).[14] *Cf. Kirk A. Knapp*, 51 S.E.C. 115, 134 (1992) ("The NASD is correct in emphasizing that participants in the industry must take responsibility for their compliance and cannot be excused for lack of knowledge, understanding or appreciation of these requirements.").

Second, FINRA intended that its changes to the definition of statutory disqualification contained in its by-laws and procedures governing eligibility proceedings apply to all individuals statutorily disqualified as a result of Sarbanes-Oxley. At the time FINRA amended the definition of statutory disqualification to conform to the Exchange Act definition, it stated that "[t]he revised definition of 'disqualification' will cause a limited number of individuals to be subject to NASD eligibility proceedings for persons subject to disqualification (i.e., NASD Rule 9520) who were not subject to those proceedings before the definitional change." *See* Shaswat Das, Esq., NASD, SEC No-Action Letter, 2007 SEC No-Act. LEXIS 540, at *2 (July 27, 2007). Indeed, as

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[14] X was represented by counsel at the time the State 1 Order was entered.

early as July 2003, FINRA amended the Form U4 to start requiring the "reporting of regulatory actions that may cause an individual to be subject to a statutory disqualification under the expanded definition of disqualification in Section 15(b)(4)(H) of the Exchange Act, created by the passage of the Sarbanes-Oxley Act."[15] *See NASD Notice to Members 03-42*.

Even if we were to find that FINRA did not clearly intend these amendments to apply to individuals such as X who were disqualified after 2002, FINRA's amendments to its by-laws and procedures governing eligibility proceedings simply did not have a retroactive effect. FINRA's changes to its by-laws and procedures did not alter the fact that the Exchange Act was amended before entry of the State 1 Order and the misconduct at issue. Nor did these changes alter the fact that X was statutorily disqualified under the Exchange Act upon entry of the State 1 Order in 2004. FINRA's amendments to its by-laws and procedures did not impair any rights that X possessed or increase liability for his misconduct, and they did not impose any new substantive duties upon X. Indeed, either the Commission or FINRA could have sought, anytime after entry of the State 1 Order, to bar X from associating with a broker-dealer. *See* 15 U.S.C. § 78o-3 (providing that the Commission or a registered securities association may bar from associating with a member any person who is subject to statutory disqualification); *see also Bradley v. School Bd. of Richmond*, 416 U.S. 696, 721 (1974) (new statute specifically authorizing attorneys' fees for prevailing parties in school desegregation cases did not impose an additional or unforeseeable obligation, and did not upset the reasonable expectations of the parties, because courts had pre-existing options available to impose attorneys fees).

Instead, FINRA's amendments clarified the procedures and mechanism pursuant to which X's existing statutorily disqualifying event and his continued association with a broker-dealer notwithstanding his disqualification would be resolved and that it would be resolved by FINRA adjudicators. *See Landgraf*, 511 U.S. at 275 (holding that application of new procedural rules generally do not raise retroactivity concerns); *see also Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999) (holding that if a statute clarifies an existing law it has no retroactive effect). We find that FINRA's amendments to its by-laws and procedures governing eligibility proceedings took away none of X's existing substantive rights and did not deprive him

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[15] FINRA also explained, in a notice to members describing the changes to FINRA's rules governing eligibility proceedings, that absent changes to its procedural rules "all persons subject to any of the additional categories of disqualification would be required to obtain approval from FINRA to enter or remain in the securities industry." *See FINRA Regulatory Notice 09-19*, 2009 FINRA LEXIS 52, at *8. The notice detailed the amendments to FINRA's eligibility proceedings and described circumstances under which certain individuals who were already subject to an existing disqualification (such as X) would be required to file an application with FINRA to continue to associate with a member firm notwithstanding the existing disqualification. The notice further informed FINRA members that not all individuals statutorily disqualified as a result of the Sarbanes-Oxley Act would be required to go through an eligibility proceeding because of the changes to FINRA's rules governing eligibility proceedings. FINRA always intended that the change to its rules governing eligibility procedures would apply to individuals statutorily disqualified after the changes and prior to the changes.

of an opportunity to know what the law was and to govern his conduct accordingly. *Landgraf*, 511 U.S. at 265. Consequently, we reject X's arguments.

III. Background Information

We now turn to the merits of the Application.

A. X's Employment History

X has been employed in the securities industry since August 1996, when he qualified as a general securities representative. He also passed the uniform securities agent state law exam in September 1996. X has been associated with the Sponsoring Firm since January 2004.[16] X was previously associated with eight firms between May 1992 and May 2005.

B. X's Disciplinary History

1. Customer Complaints

The record reflects that ten customer complaints have been filed against X since 1999.[17]

In 1999, a customer alleged that X engaged in unauthorized trading and failed to execute trades in his account. The customer sought damages of $5,400. X personally settled the claim for $5,585. This complaint is neither disclosable nor reportable on CRD. X testified that this complaint was filed several months after he left his firm, and another broker was handling this account.

In 1999, a customer alleged that X engaged in unauthorized trading. The customer sought damages of $166,000. X's former firm settled the claim for $100,000, and X contributed $8,333 to that settlement. X testified that he did not handle this account.

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[16] This is consistent with FINRA's interpretation of Article III, Section 3(c) of FINRA's By-Laws, which permits individuals who become statutorily disqualified while they are employed to continue working pending the outcome of the statutory disqualification process.

[17] Nine of these complaints are listed on X's report filed with FINRA's Central Registration Depository ("CRD"®), and one was disclosed by the Firm pursuant to NASD Rule 3070 (although it was not listed on X's CRD report). From 1998 through the end of 2008, several other customers lodged complaints against X and the Firm disclosed such complaints pursuant to Rule 3070. Several of these complaints were denied by the Firm with no further customer action. The remaining complaints are either insufficiently described in the record or were resolved by the Firm through a settlement with the complaining customer (with no additional explanation). We do not consider these additional complaints in connection with this decision.

In 2000, a customer alleged that X charged excessive commissions, and the customer sought damages of $5,057. Although CRD lists this matter as currently pending, and neither disclosable nor reportable, X testified that he believes that he personally paid between $1,500 and $4,000 to settle this matter.

In 2003, a customer alleged that X improperly handled his account, and the customer sought damages of $31,000. X's former firm settled the matter for $19,980, without X personally contributing to the settlement. X stated that the customer's mother, also X's customer, had a dispute with X that "created a negative sentiment" in the customer's relationship with X and that the customer complained about the amount of commissions earned by X and the firm.[18]

In 2003, a customer alleged that X engaged in unauthorized trading. The customer sought $86,000 in damages. The matter was dismissed, and it is neither disclosable nor reportable on CRD.

In 2003, a customer alleged that X engaged in excessive trading. The customer sought damages of $60,000. The matter was settled for $24,000, without X personally contributing to the settlement. X testified that this customer was his but he could not remember the details of the matter except that he disputed the allegations.

In 2005, a customer alleged that X charged excessive commissions, and the customer sought damages of $47,000. The Sponsoring Firm settled the matter for $40,000 without X personally contributing to the settlement. X testified that this customer "knew the game" and simply wanted to recoup from X some of the losses in his account due to market fluctuations.

In 2007, a customer alleged that X charged excessive commissions and sought $60,000 in damages. The Sponsoring Firm settled the complaint for $37,000, without X personally contributing to the settlement. X testified that this customer was being "coached" by his local broker who wanted more of the customer's business and explained that the customer informed X's supervisor that he had pulled X's CRD and asked that the Firm "just give him some money back and he'll go away." Firm Employee 1 testified that he reviewed the customer's account and determined that X did not excessively trade the account.

In 2007, a customer alleged that X engaged in improper and unsuitable trading. The customer sought $45,057 in damages. The matter was settled for $9,995 by X's former firm, without X personally contributing to the settlement. The matter is neither disclosable nor reportable on CRD. X stated that he handled this account with two other brokers at his former firm, the customer closed the account without ever complaining about X's handling of the

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[18] After the hearing, the Hearing Panel requested that X provide an explanation in writing for this customer complaint and another complaint filed in July 2007. With respect to the March 2003 customer complaint, X states that the Firm settled the matter for $9,990 (versus $19,980 as disclosed on CRD). We do not find this discrepancy to be material.

account, and several years later the customer filed a claim in arbitration against X, his former firm, and the other two registered representatives.

Finally, in 2008, a customer alleged that X engaged in an unauthorized transaction. The Sponsoring Firm settled the matter for $2,284. Firm Employee 1 testified that he was familiar with this matter, disputed the customer's allegations, and reversed the commissions earned on the transaction as a courtesy.

2. Other Matters

In 2005, State 4 entered a Consent Order of Withdrawal, which required X to withdraw his registration in State 4. The State 4 order also prohibited X from reapplying for registration in State 4 for two years and required X to pay $750. The State 4 order was based upon X's failure to timely update his Form U4 to reflect the 1999 customer complaint (described above). X testified that he was "shocked" that the complaint had not been listed on his Form U4 because he had disclosed the matter to his supervisor at his prior firm, although he admittedly did not follow up to ensure that the complaint was reported on his Form U4.

FINRA also named X in an informal action. Specifically, in 2009, FINRA issued X a Cautionary Action in connection with unsuitable recommendations in a customer's account, excessive trading in customer accounts, and using personal email accounts for business purposes. With respect to the unsuitable recommendations, X stated in writing that he obtained an updated customer account form from the customer reflecting his investment objectives as "speculation" and "active trading" rather than "preservation of capital" and "conservative" as inaccurately listed on the form. With respect to the excessive trading, X disputed that the trading was excessive and blamed the high turnover ratios on substantial declines in the accounts' equity. X further stated that the Firm subsequently implemented new procedures pursuant to which it would conduct more frequent reviews of turnover and cost-to-equity ratios in certain active accounts. X explained that the use of personal email was an isolated incident resulting from problems with the Firm's email account.

Finally, in 1995, X was charged by State 2 with criminal possession of marijuana, a misdemeanor. The matter was adjourned in consideration of dismissal, and the charges were ultimately dismissed.

Other than the State 1 Order, and the matters referenced above, the record shows no other criminal, disciplinary or regulatory proceedings, complaints, or arbitrations against X.

C. The Sponsoring Firm

The Sponsoring Firm has been a FINRA member since January 1999 and is based in City 2, State 3. The Proposed Supervisor testified that the Sponsoring Firm has two offices in State 2 (including the City 1 office), the Sponsoring Firm's home office, and one other office in State 3. The Proposed Supervisor further testified that the Sponsoring Firm employs seven registered representatives and six registered principals. The Sponsoring Firm describes its business as "corporate equities, corporate debt, mutual funds, U.S. Government securities, non-exchange

member arranging for transactions in listed securities by exchange member, [and] private placements."

1. Regulatory Actions

In 2007, FINRA accepted a Letter of Acceptance, Waiver and Consent ("AWC") from the Sponsoring Firm and the Firm COO, which found that the Sponsoring Firm and the Firm COO failed to report timely customer complaints, failed to retain emails and to maintain supervisory procedures designed to ensure compliance with applicable rules regarding the maintenance of emails, failed to implement a written training plan to comply with continuing education requirements, failed to conduct annual branch office inspections, and permitted customers to purchase securities in accounts that should have been frozen in violation of Reg. T. FINRA censured the Sponsoring Firm and the Firm COO and fined them (jointly and severally) $125,000.

In 2006, FINRA accepted an AWC from the Sponsoring Firm and the Firm COO, which found that they failed to adequately implement the Sponsoring Firm's Anti-Money Laundering ("AML") compliance program. FINRA censured the Sponsoring Firm and the Firm COO, fined the Sponsoring Firm $15,000, and fined the Firm COO $10,000. FINRA also required that the Firm COO take a training program.

2. Routine Examinations

In 2010, FINRA conducted a compliance conference with the Sponsoring Firm for failing to prevent and detect churning in at least 10 customer accounts. FINRA also issued the Sponsoring Firm a Cautionary Action, which cited it for failing to include required language in its 2010 annual CEO certification and for failing to effect such certification prior to the anniversary date of the previous year's certification.

In 2010, FINRA issued the Sponsoring Firm a Cautionary Action for the following deficiencies: effecting transactions in accounts while they were on restriction; failing to establish and maintain an adequate supervisory system to monitor activities in restricted accounts and failing to test its Regulation S-P procedures in 2008; and failing to document the time the Sponsoring Firm received certain customer orders.

In 2009, FINRA conducted a compliance conference with the Sponsoring Firm for the following deficiencies: failing to follow its heightened supervisory procedures with respect to X; failing to identify Firm Employee 1 as a producing manager and failing to place him on heightened supervision; making unsuitable recommendations in soliciting certain accounts to trade at levels for which there was no reasonable basis and failing to issue two "happy" letters to customers on the Sponsoring Firm's active account report; failing to establish a supervisory system that required the branch office manager and compliance officer to review the branch activities in customer accounts to detect excessive trading and unsuitable recommendations; making unsuitable recommendations in a customer account managed by X; placing trades in accounts while they were under restriction and held insufficient cash; making an erroneous FOCUS report filing; failing to establish and maintain Written Supervisory Procedures ("WSPs")

that included procedures concerning instant messages or Bloomberg Station correspondence and procedures for performing account turnover or cost-to-equity ratio analyses; permitting several employees (including X and Firm Employee 1) to use personal email accounts for business related purposes; failing to capture and preserve several Firm emails accounts; failing to identify the registered representative responsible for certain order tickets and to properly record entry times for orders; and reporting a settlement one day late. FINRA also issued the Sponsoring Firm a Cautionary Action for certain of these deficiencies.

In 2007, FINRA conducted a compliance conference with the Sponsoring Firm for the following deficiencies: failing to provide customers with the Firm's business continuity plan disclosure documents at account opening; failing to update its Uniform Application for Broker-Dealer Registration and Uniform Branch Office Registration Form to reflect that a branch office had been terminated; failing to have the Firm's third party vendor notify FINRA of its use of electronic storage media; failing to provide an annual report by the Firm's designated principal to senior management regarding the Firm's supervisory controls and procedures; failing to approve in writing Firm Employee 1's outside business activity; failing to ensure that all registered representatives attended the Firm's 2006 Annual Compliance Meeting; failing to establish WSPs for holding customer mail, failing to implement WSPs concerning the review of excess commissions and approval of outside business activities, and failing to implement WSPs regarding the accuracy and timelines of certain forms; failing to implement the Firm's AML procedures; failing to charge fair and reasonable commissions on nine transactions; and failing to ensure that recommendations to customers were suitable.

In 2006, FINRA issued the Firm a Cautionary Action for failing to comply with MSRB rules, including MSRB supervisory rules and FINRA supervisory rules.

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

IV. X's Proposed Business Activities and Supervision

The Firm originally proposed that it would continue to employ X as a general securities representative in the Firm's City 1, State 2 branch office, and that X would be supervised at the City 1 office by Firm Employee 1.[19] However, in 2012, the Sponsoring Firm informed FINRA that "Firm Employee 1 has encountered certain complications in his personal life" that have

[19] Firm Employee 1 currently serves as the branch manager of the Sponsoring Firm's City 1 office. Firm Employee 1 has been the subject of three customer complaints. In addition, in 2002, Firm Employee 1 consented to a stipulation and consent with the American Stock Exchange, pursuant to which he was fined $5,000. FINRA also issued Firm Employee 1 a Cautionary Action for failing to adequately supervise representatives of the City 1 office (including X) because of excessive trading in customer accounts and X's unsuitable recommendations to a customer, failing to properly supervise the accuracy of order tickets, and the improper use of personal email by X and Firm Employee 1.

required him to spend time overseas. The Sponsoring Firm now proposes that it will employ X as a general securities representative in the Sponsoring Firm's main office in City 2, State 3, and that the Proposed Supervisor will serve as X's supervisor. The Sponsoring Firm represents that the Proposed Supervisor "will be supervising X pursuant to the same strict conditions and restrictions set forth in the original plan submitted by the firm," which is described below. X will be compensated by commission.

The Proposed Supervisor first registered as a general securities representative in August 2000 and qualified as a general securities principal in December 2004. The Proposed Supervisor was registered with the Sponsoring Firm from April 2003 through September 2005, and again from March 2006 to the present. In addition to the Sponsoring Firm, the Proposed Supervisor has been associated with seven other firms. The Proposed Supervisor currently serves as the Sponsoring Firm's chief compliance officer, and he testified that the Sponsoring Firm's operations staff also reports to him.

According to CRD, two customer complaints have been filed against the Proposed Supervisor. In 2007, a customer alleged that the Proposed Supervisor engaged in excessive and unsuitable trading. The customer sought damages of $400,000. The Sponsoring Firm settled this matter for $75,000, without the Proposed Supervisor personally contributing to the settlement. The Proposed Supervisor stated that he had no personal involvement with the investments at issue and he was named in the complaint because he is a control person of the Sponsoring Firm.

In 2008, customers alleged that the Proposed Supervisor churned their account and charged excessive commissions and fees. The customers sought damages of $443,056. The Sponsoring Firm settled this matter for $112,500, without the Proposed Supervisor personally contributing to the settlement. The Proposed Supervisor stated that he had no personal involvement with the customers and believed he was named in the complaint because he is a control person of the Sponsoring Firm.

Finally, in 1998, the Proposed Supervisor received a discharge in bankruptcy. Other than the matters referenced above, CRD shows no other criminal, disciplinary or regulatory proceedings, complaints, or arbitrations against the Proposed Supervisor.

The Sponsoring Firm originally submitted the following heightened plan of supervision, which has been in place since 2004:[20]

1. Customer account activity will be monitored on a monthly basis.

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[20] X testified that he was also under heightened supervision at his prior firm because of several customer complaints, and that his prior supervisor preapproved all of his transactions.

2. All new accounts will be reviewed, and a sample of these accounts will be called to verify the information on the new account application is accurate and complete.

3. All of X's tickets must be initialed by Firm Employee 1, or his designee in the case of his absence, prior to execution.

4. X will receive training in addition to the continuing education firm element. This training will involve customer suitability and ethics. He will be required to submit proof of completion to Firm Employee 1.

5. A monthly review of X's accounts will be performed to review items such as: extensions, liquidations, and trade corrections.

6. All of X's margin accounts will be reviewed monthly.

As stated above, the Firm has represented that the Proposed Supervisor is now supervising X under this plan and will be X's supervisor going forward.

V. Member Regulation's Recommendation

Member Regulation recommends that the Application be denied because, in its view: (1) X's disciplinary history "is replete with customer complaints and regulatory actions" and he has been the subject of regulatory actions and complaints since entry of the State 1 Order (which remains in effect); (2) the plan of heightened supervision is inadequate; (3) Firm Employee 1 is not suitable to supervise X based upon his regulatory history and customer complaints filed against him; and (4) the Firm has an extensive disciplinary history, which includes violations of supervisory controls and procedures.

VI. Discussion

In evaluating this application, we assess whether the sponsoring firm has demonstrated 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*, Redacted Decision No. SD06002, slip op. at 5 (NASD NAC 2006), *available at* http://www.finra.org/web/groups/industry/@ip/@enf/@adj/documents/nacdecisions/p036476.pdf; *see also Frank Kufrovich*, 55 S.E.C. 616, 624 (2002) (holding that FINRA "may deny an application by a firm for association with a statutorily-disqualified individual if it determines that employment under the proposed plan would not be consistent with the public interest and the protection of investors"); FINRA By-Laws, Article III, Section 3(d) (providing that FINRA may approve association of statutorily disqualified person if such approval is consistent with the public interest and the protection of investors). Factors that bear upon our assessment include the nature and gravity of the statutorily disqualifying misconduct, the time elapsed since its occurrence, the restrictions imposed, the totality of the regulatory and criminal history, 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. The sponsoring firm has

the burden of demonstrating that the proposed association is in the public interest despite the disqualification. *See Timothy P. Pedregon, Jr.*, Exchange Act Rel. No. 61791, 2010 SEC LEXIS 1164, at *16 (Mar. 26, 2010).

After carefully reviewing the entire record in this matter, we find that X's proposed continued association with the Firm would create an unreasonable risk of harm to investors and the market. Accordingly, we deny the Application for X to continue to associate with the Sponsoring Firm as a general securities representative.

We find that X's disqualifying event is serious and securities-related. The State 1 Order found that X engaged in unauthorized transactions in customer accounts, made unsuitable recommendations to customers, and regularly utilized high pressure sales tactics. These matters are highly troubling. *See SEC v. Wolfson*, 539 F.3d at 1253 n.6 (stating that boiler rooms typically involve salespeople making calls to lists of potential investors in order to peddle speculative or fraudulent securities and using high-pressure sales pitches containing misleading information about the nature of the investment); *Howard Alweil*, 51 S.E.C. 14, 18 (1992) ("[u]nauthorized trading is very serious misconduct"); *Dep't of Mkt. Regulation v. Kresge*, Complaint No. CMS030182, 2008 FINRA Discip. LEXIS 46, at *15 n.12 (FINRA NAC Oct. 9, 2008) (holding that "it is axiomatic that fraud and unsuitable recommendations rank among the most serious kinds of securities law violations"). Further, the State 1 Order prohibits X from even seeking registration in State 1 as a broker-dealer sales representative or an investment adviser representative without prior written consent from the State 1 Department (which may be granted or withheld in the State 1 Department's sole discretion). We do not credit X's attempts at the hearing to minimize his role in certain of the misconduct underlying the State 1 Order.[21] *Cf. Am. Inv. Serv., Inc.*, 54 S.E.C. 1265, 1273 (2001) (denying a firm's application to associate with statutorily disqualified persons who "demonstrate[d] a troubling lack of understanding . . . of their own role in the events that were at issue in the [statutorily disqualifying event]").

We have also considered that at least ten customers have filed complaints against X since 1999. X personally paid at least $15,400 to settle these matters, and his firms paid approximately $225,000 to settle matters filed against X. Although X provided explanations for some of the customer complaints, we find that at least three of the customer complaints (not including the complaint underlying the State 1 Order) involved allegations of unauthorized transactions, and X personally contributed funds to settle two of these three complaints. In addition, we find that State 4's order requiring X to withdraw his registration (and prohibiting him from reapplying for two years) in connection with his failure to timely update his Form U4, and FINRA's 2009 Cautionary Action, involve serious matters. As a whole, we find X's

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[21] At the hearing, other than stating that he did not use sales scripts at his prior firm, X did not attempt to explain the findings in the State 1 Order concerning his use of high pressure sales tactics. In addition, we reject X's explanations that "he was a kid" and "still learning" regarding the misconduct underlying the State 1 Order and early customer complaints. *See Scott Epstein*, Exchange Act Rel. No. 59328, 2009 SEC LEXIS 217, at *72-73 (Jan. 30, 2009) (holding that youth or inexperience does not excuse a registered representative's duty to his customers), *aff'd*, 416 F. App'x 142 (3d Cir. 2010).

explanations concerning these matters to be inadequate and raise serious concerns regarding his dealings with customers and his ability to comply with securities laws and regulations. *See Timothy H. Emerson Jr.*, Exchange Act Rel. No. 60328, 2009 SEC LEXIS 2417, at *17-18 (July 17, 2009) (holding that FINRA reasonably concluded that several customer complaints filed against disqualified individual and settled by his firm, as well as discharges from prior firms, reflected poorly on his judgment and trustworthiness).

We further find that the Sponsoring Firm has not demonstrated that it can properly supervise a statutorily disqualified individual such as X, regardless of who serves as X's primary supervisor. *See id.* at *18 (holding that an applicant must establish that it will be able to adequately supervise a statutorily disqualified individual by imposing a stringent plan of heightened supervision); *Citadel Sec. Corp.*, Exchange Act Rel. No. 49666, 2004 SEC LEXIS 949, at *13 (May 7, 2004) ("[I]n determining whether to permit the employment of a statutorily disqualified person, the quality of the supervision to be accorded that person is of utmost importance. We have made it clear that such persons must be subject to stringent oversight by supervisors who are fully qualified to implement the necessary controls.") (internal quotation omitted). The Sponsoring Firm's proposed plan of heightened supervision is skeletal, lacks specificity, and is not specifically tailored to X and preventing misconduct similar to the State 1 Order. For example, although X and Firm Employee 1 testified that Firm Employee 1 listened to some of X's phone calls with customers, the proposed plan contains no provisions regarding the monitoring or review of X's communications and correspondence with customers by anyone at the Firm. The plan does not specify how or whether the Proposed Supervisor's monthly monitoring of customer account activity will be documented and maintained. Further, despite the fact that X has received numerous complaints throughout his career, the plan does not contain any special provisions concerning how future customer complaints against X will be handled.

In addition, the supervisory plan does not designate a backup supervisor or provide specific provisions concerning who will supervise X in the Proposed Supervisor's absence.[22] *Cf. Pedregon*, 2010 SEC LEXIS 1164, at *27 (finding "troubling" designation of unqualified individual as backup supervisor). Firm Employee 1 also testified that the supervisory procedures for the other registered representative he supervised at the Sponsoring Firm's City 1, State 2 office are substantially similar to the plan proposed for X. We find that the Sponsoring Firm's proposed plan does not reflect the careful consideration required to effectively supervise a statutory disqualified individual and lacks the specifically tailored provisions necessary to prevent and deter future misconduct.[23] *See Leslie A. Arouh*, Exchange Act Rel. No. 62898, 2010

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[22] The Proposed Supervisor testified that he was the backup supervisor under the original proposed plan.

[23] Although counsel for the Sponsoring Firm represented that the Sponsoring Firm would incorporate into the heightened supervisory plan any other terms necessary for the Application to be approved, it is the applicant's burden to draft and propose a supervisory plan that provides for stringent supervision. *See Pedregon*, 2010 SEC LEXIS 1164, at *28 n.32 (holding that FINRA was fully justified in requiring a firm to provide specifics before approving an application rather than accepting assurances that the firm would later devise an appropriate plan); *Emerson*, 2009

[Footnote continued on next page]

SEC LEXIS 2977, at *38-39 (Sept. 13, 2010) (finding inadequate proposed plan of supervision where much of the plan applies to all firm employees).

Moreover, even though X has been on heightened supervision since 1999, the State 1 Order and almost all of X's customer complaints have occurred while he has been on heightened supervision, including at least four customer complaints since the Sponsoring Firm implemented its heightened supervisory plan currently under consideration. During this period, State 4 also sanctioned X and FINRA issued X a Cautionary Action. Under these circumstances we are simply not persuaded that the Sponsoring Firm can effectively supervise X pursuant to the same heightened plan that has been in place at the Sponsoring Firm since 2004. We further find that in 2009 FINRA cited the Sponsoring Firm for failing to follow its heightened supervisory procedures with respect to X and failing to place Firm Employee 1 under the Sponsoring Firm's heightened procedures. *See Emerson*, 2009 SEC LEXIS 2417, at *20-21 (considering a firm's prior violation of its own rules regarding heightened supervision in denying application). These facts support our finding that the Sponsoring Firm is unable to provide the stringent supervision required of a statutorily disqualified individual under the proposed heightened supervisory plan.

VII. Conclusion

Accordingly, we find that it is not in the public interest, and would create an unreasonable risk of harm to the market or investors, for X to continue to associate with the Sponsoring Firm as a general securities representative. We therefore deny the Application.

On Behalf of the National Adjudicatory Council,

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Marcia E. Asquith
Senior Vice President and Corporate Secretary

[cont'd]

SEC LEXIS 2417, at *20 (holding that drafting a supervisory plan is the firm's responsibility, not FINRA's).