

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of
The Continued Association of
David P. Brown
as an
Investment Company and Variable Contracts
Products Limited Representative
with
NYLIFE Securities, LLC

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

SD-2150

April 5, 2018

I. Introduction

On February 27, 2017, NYLIFE Securities, LLC (the “Firm” or “NYLIFE”) filed a Membership Continuance Application (the “Application”) with FINRA’s Department of Registration and Disclosure (“RAD”). The Application seeks to permit David P. Brown, a person subject to statutory disqualification, to continue to associate with the Firm as an investment company and variable contracts products limited representative. A hearing was not held in this matter; rather, pursuant to FINRA Rule 9523(a), FINRA’s Department of Member Regulation (“Member Regulation”) recommended to the Chairperson of the Statutory Disqualification Committee, acting on behalf of the National Adjudicatory Council, that it approve Brown’s continued association with the Firm pursuant to the terms and conditions set forth below.

For the reasons explained below, we approve the Application to permit Brown to continue to associate with the Firm as an investment company and variable contracts products limited representative.

II. The Statutorily Disqualifying Event

Brown is statutorily disqualified due to a FINRA Order Accepting Offer of Settlement dated October 27, 2016 (the “Order”). The Order found that, among other things, Brown willfully failed to disclose on his Uniform Application for Securities Industry Registration or Transfer (“Form U4”) two state tax warrants and five federal tax liens totaling approximately

\$316,805.¹ The State of New York and the IRS filed the warrants and liens against Brown from August 2008 through August 2013. Brown did not disclose these matters on his Form U4 until December 2013.² FINRA suspended Brown for three months and fined him \$5,000. Brown has served his suspension and paid the fine in full.

In the Application, Brown states that the tax warrants and liens were the result of “serious medical issues that resulted in the significant decline of my commissions and fee revenues, and the fallout from the 2008-2009 financial and mortgage crisis.” Brown states that he was unable to keep pace with his estimated tax payments and erroneously believed that since his wages had not been garnished and he was in settlement negotiations with the IRS, he was not obligated to report the federal tax matters. Brown further states that because he had resolved the New York State tax warrants within 120 days, he believed that he was not required to report these matters on his Form U4. Brown states that he now “realize[s] that this earlier conclusion about my reporting obligations was incorrect, and that I should have informed NY Life Securities as soon as I received the initial IRS and NYS lien notices. . . . From this experience, I have a broader understanding of the importance of making timely filings of required information.”³

¹ FINRA’s By-Laws provide that a person is subject to “disqualification,” and thus must seek and obtain FINRA’s approval prior to associating with a member firm, if he is disqualified under Section 3(a)(39) of the Securities Exchange Act of 1934 (“Exchange Act”). *See* FINRA By-Laws, Art. III. Exchange Act Section 3(a)(39)(F) provides that a person is subject to statutory disqualification if he has willfully made a false or misleading statement of material fact, or has omitted to state a material fact required to be disclosed, in any application or report filed with a self-regulatory organization.

Question 14.M of Form U4 asks, “Do you have any unsatisfied judgments or liens against you?” Article V, Section 2(c) of FINRA’s By-Laws requires that an associated person keep his Form U4 current at all times and to update information on the Form U4 within 30 days. Further, FINRA Rule 1122 states that, “[n]o member or person associated with a member shall file with FINRA information with respect to membership or registration which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or fail to correct such filing after notice thereof.”

² Brown has satisfied the New York State tax warrants and three of the five federal tax liens. The amount outstanding on Brown’s two unsatisfied federal tax liens as of September 2017 was approximately \$168,000. Brown has been paying these obligations pursuant to an installment agreement with the IRS.

³ The record shows that in addition to the tax warrants and liens underlying the Order, New York State and the IRS filed numerous additional warrants and liens against Brown. These warrants and liens have been satisfied.

III. Background Information

A. Brown

Brown first registered as an investment company and variable contracts products limited representative in April 1984 and as a direct participation programs limited representative in October 1984. He also passed the uniform securities agent state law examination in July 1984 and the uniform investment adviser law examination in May 2001. Brown has been associated with the Firm since February 1984. He has never been associated with another broker-dealer.⁴

Other than the disqualifying Order, in June 2007 Brown entered into a Stipulation and Consent Order brought by the State of New York Insurance Department. The order found that Brown violated New York regulations by leaving a laptop computer in an unoccupied vehicle, which contained non-encrypted confidential customer information. The computer was subsequently stolen. For his misconduct, Brown was fined \$1,000.

CRD also shows that in February 1997, a customer filed a complaint against Brown. The complaint alleged that Brown improperly replaced certain whole life insurance policies and made misrepresentations in connection with whole life and variable life insurance policies. The customer requested a refund on his existing policies. This matter was settled for \$634.

Finally, CRD shows that in August 1979, Brown filed a personal bankruptcy petition.

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

B. The Firm

The Firm has been a FINRA member since June 1970 and is based in New York City. The Application states that the Firm maintains 2,293 branch offices and 130 Offices of Supervisory Jurisdiction (“OSJs”), and employs 720 registered principals and 9,136 registered representatives. The Firm represents that it currently employs five other individuals subject to statutory disqualification.⁵

⁴ FINRA’s Central Registration Depository (“CRD”®) also indicates that Brown sells fixed insurance products for a variety of insurance carriers and is a registered investment adviser.

⁵ For four of these five disqualified individuals, the Firm was not required to initiate a FINRA eligibility proceeding. See *FINRA Regulatory Notice 09-19*, 2009 FINRA LEXIS 68, at *11-12 (Apr. 2009) (providing that for statutory disqualifications resulting from a willful violation of federal securities laws, a firm is not required to initiate a FINRA eligibility proceeding if the resulting sanction is no longer in effect). The Firm’s other statutorily disqualified individual is disqualified due to a felony conviction, and FINRA recently notified the Firm of this statutory disqualification. All five of these individuals work in offices other than the Firm’s White Plains, New York office where Brown is located.

1. Routine Examinations

FINRA conducted the Firm's two most recent examinations in 2015 and 2016.

The 2015 Sales Practice examination resulted in a Cautionary Action for certain violations of securities rules and regulations. Notable among the violations was the Firm's failure to establish and maintain an adequate supervisory system and written supervisory procedures ("WSPs") with respect to the ongoing monitoring of mutual fund share class appropriateness and the Firm's failure to establish a system to retain, monitor, and supervise emails at one of its branch offices.⁶ The Firm responded in writing that it corrected the deficiencies noted.

The Firm was also subject to a municipal examination in 2016. That examination resulted in a Cautionary Action for a single exception for the Firm's failure to document that it made required disclosures to customers in connection with municipal securities transactions. The Firm responded in writing that it corrected the deficiencies noted.

2. Regulatory History

Within the past 10 years, the Firm has been the subject of three state regulatory actions and one FINRA action.

On March 31, 2017, the Firm entered into a consent order with the New Hampshire Bureau of Securities Regulation (the "Bureau"). The Bureau found that the Firm violated New Hampshire law by failing to enforce its compliance requirements regarding the termination of agents. Specifically, in February 2016, the Firm terminated an agent but failed to shut down the agent's office until June 2016. The Bureau censured the Firm and fined it \$7,500.

On January 17, 2017, the Firm entered into a Consent Agreement ("the Indiana Order") with the State of Indiana, Office of the Secretary of State Securities Division. The Indiana Order arose out of the Firm's failure to exercise reasonable supervision of a registered representative who engaged in illegal outside business activities. Specifically, the registered representative, while acting as the chief executive officer of a wealth management company, sold unregistered and non-exempt securities promising a high rate of return under the umbrella of the wealth management entity. It was ultimately revealed that the registered representative was operating a Ponzi scheme through which he defrauded investors for more than \$16 million. Although the Firm performed annual audits of the representative's activities, it was unaware that the representative was operating his wealth management company as a Ponzi scheme. The Firm agreed to pay a civil penalty of \$200,000, \$50,000 in costs, and contributed \$25,000 to Indiana's Investor Protection Trust. The Indiana Order also indicates that the Firm paid restitution to customers.

⁶ This exception did not relate to the branch office where Brown is located.

On December 17, 2015, the Firm entered into a Consent Order with the Commonwealth of Massachusetts, Office of the Secretary of the Commonwealth Securities Division (the “Division”). The Division alleged that the Firm failed to supervise the activities of a former registered representative who made unsuitable recommendations to two customers. The Firm agreed to pay \$51,541 in restitution to the customers and offered to rescind all annuity contracts sold to the customers. The Firm also agreed to pay a fine of \$25,000 and to revise its WSPs.

Finally, in June 2007, FINRA accepted from the Firm a Letter of Acceptance, Waiver and Consent (“AWC”) for violations of NASD Rules 2110, 2310, and 3010. Without admitting or denying the allegations, the Firm consented to findings that between January 2003 and July 2004, it effected transactions where it made recommendations to customers to purchase class B shares through its registered representatives without considering that an equal investment in class A shares would have been more advantageous for certain customers. The AWC also found that the Firm’s WSPs were not reasonably established or maintained to address the benefits of other classes of shares. FINRA censured the Firm, fined it \$354,000, and ordered it to comply with a number of undertakings.

IV. Brown’s Proposed Business Activities and Supervision

The Firm proposes that Brown will continue to work from the Firm’s White Plains, New York office. The Firm represents that Brown will offer retail products (including mutual funds, 529 plans, and variable products from the Firm’s approved list). Brown will be compensated by commissions. Brown states that his customers are “primarily senior-aged individuals who have been [his] clients for several decades.”⁷

The Firm also proposes that Susan Green (“Green”) will serve as Brown’s primary on-site supervisor. Green does not currently supervise any other individuals. She first registered as a general securities representative in December 1983, as a financial and operations principal in February 1990, as a general securities principal in November 1993, and as a municipal securities principal in February 2004. She also passed the uniform securities agent state law examination in December 1984 and the uniform investment adviser examination in May 1996. Green has been associated with the Firm since September 2015, and was previously associated with 13 firms. The record shows no disciplinary or regulatory proceedings, complaints, or arbitrations against Green.

If Green is on vacation or out of the office for an extended period, the Firm designated Eugene Lutz (“Lutz”) to serve as Brown’s alternate, on-site supervisor. Lutz is a managing partner of the Firm and the branch manager of the White Plains, New York office. He first registered as an investment company and variable contracts products limited representative in February 2004, as an investment company and variable contracts products principal in August 2008, as a general securities representative in March 2011, and as a general securities principal

⁷ Brown further states that his primary revenue source is his insurance business, which comprises approximately 70% of his total revenues.

in May 2011. He also passed the uniform securities agent state law examination in August 2004. Lutz has been with the Firm since August 2003, and has never been associated with another broker-dealer. The record shows no disciplinary or regulatory proceedings, complaints, or arbitrations against Lutz.⁸

V. Member Regulation's Recommendation

Member Regulation recommends approval of the Firm's request for Brown to continue to associate with the Firm as an investment company and variable contracts products limited representative, subject to the terms and conditions of heightened supervision described below.

VI. Discussion

We have carefully considered the entire record in this matter. Based on this record, and pursuant to the Commission's controlling decisions in this area, we approve the Firm's Application to employ Brown as an investment company and variable contracts products limited representative, subject to the supervisory terms and conditions set forth below.

A. The Legal Standards

We acknowledge that Brown, as a registered representative, was responsible for knowing the rules of the securities industry and for timely updating his Form U4. *See, e.g., Robert E. Kauffman*, 51 S.E.C. 838, 840 (1993) ("Every person submitting registration documents [to FINRA] has the obligation to ensure that the information printed therein is true and accurate."), *aff'd*, 40 F.3d 1240 (3d Cir. 1994) (table). The SEC has emphasized that Form U4 "is critical to the effectiveness of the screening process used to determine who may enter (and remain in) the industry. It ultimately serves as a means of protecting the investing public." *See Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *25-26 (Nov. 9, 2012). A registered representative's financial problems "raise concerns about whether [he] could responsibly manage his own financial affairs, and ultimately cast doubt on his ability to provide trustworthy financial advice and services to investors relying on him to act on their behalf as a securities industry professional." *Id.* at *32.

We also recognize, however, that FINRA weighed the gravity of Brown's failures to disclose when it executed the Order in October 2016. After considering Brown's entire history in the securities industry, FINRA concluded that a three-month suspension and \$5,000 fine were appropriate sanctions for his misconduct. Brown served this suspension and paid the fine in full.

⁸ In the Application, the Firm states that Lutz supervises 189 individuals. It further states that "[a]pproximately 10 of the supervised individuals are "Partners" responsible for recruiting and developing sales agents. Also 64 of the supervised individuals are selling registered representatives of [the Firm] . . . The remainder of the supervised individuals are non-registered agents offering and selling traditional insurance and annuity products through New York Life Insurance Company."

In such circumstances, the Commission has instructed FINRA to evaluate a statutory disqualification application pursuant to the standards enunciated in the Commission's decisions in *Paul Edward Van Dusen*, 47 S.E.C. 668 (1981), and *Arthur H. Ross*, 50 S.E.C. 1082 (1992). See *May Capital Group, LLC* (hereinafter "*Rokeach*"), Exchange Act Release No. 53796, 2006 SEC LEXIS 1068, at *21 (May 12, 2006) (holding that FINRA must apply *Van Dusen* standards to the membership continuance applications of statutorily disqualified individuals whose disqualifications resulted from FINRA enforcement action).

Van Dusen and *Rokeach* provide that in situations where an individual's misconduct has already been addressed by the Commission or FINRA, and sanctions have been imposed for such misconduct, FINRA should not consider the individual's underlying misconduct when it evaluates a statutory disqualification application. The Commission stated that when the period of time specified in the sanction has passed, in the absence of "new information reflecting adversely on [the applicant's] ability to function in his proposed employment in a manner consonant with the public interest," it is inconsistent with the remedial purposes of the Exchange Act and unfair to deny an application for re-entry. *Van Dusen*, 47 S.E.C. at 671.

The Commission also noted in *Van Dusen*, however, that an applicant's re-entry is not "to be granted automatically" after the expiration of a given time period. *Id.* Instead, the Commission instructed FINRA to consider other factors, such as: (1) other misconduct in which the applicant may have engaged; (2) the nature and disciplinary history of the prospective employer; and (3) the supervision to be accorded the applicant. *Id.*

B. Application of the *Van Dusen* Standards

After applying the *Van Dusen* standards to this matter, we have determined to approve the Firm's Application to continue to employ Brown.

First, the record does not show any complaints, regulatory actions, or criminal history since the Order. Given the expiration of time for the suspension imposed upon Brown, and the teachings of *Van Dusen*, he is now permitted to seek re-entry to the securities industry.

Second, while we acknowledge that the Firm has had several regulatory actions filed against it, we agree with Member Regulation's general assessment that this history does not warrant denial of the Application.⁹ In reaching this conclusion, we have considered the specific supervisory structure in place for Brown, including well-qualified supervisors and the comprehensive proposed heightened supervisory plan. We find nothing in the record to suggest that the Firm will be unable to provide the stringent supervision necessary for a statutorily disqualified individual such as Brown.

Third, based on the record before us, we find that the Firm's proposed plan of supervision is sufficiently stringent and comprehensive, and we find that the supervisors designated to

⁹ The record further shows that although FINRA noted several exceptions in connection with the Firm's past two examinations, the Firm corrected the deficiencies.

administer the plan are capable of doing so. The primary designated supervisor, Green, is well qualified, has been in the securities industry for more than 30 years, and her record has no disciplinary or regulatory history. She will also supervise Brown on-site. Likewise, Lutz, who has a record without disciplinary or regulatory history, is sufficiently qualified and experienced to act as Brown's alternate supervisor. Lutz will also supervise Brown on-site when Green is not in the office.

We are satisfied that the following heightened supervisory procedures will enable the Firm to reasonably monitor Brown's activities on a regular basis:¹⁰

1. The written supervisory procedures of NYLIFE will be amended to state that Green will be the designated primary supervisor responsible for carrying out and documenting that each of the supervisory steps included and described in this plan are carried out;
2. Brown will not maintain discretionary accounts and as a Series 6 – Investment Company Products/Variable Contracts Limited Representative he is not permitted to make any recommendations to buy, hold or sell individual equities, exchange traded funds, or bonds;
3. Brown will not act in a supervisory capacity;
4. Brown will be supervised on-site by Green;
5. Green will review and pre-approve each securities account, prior to the opening of the account by Brown. Account paperwork will be documented as approved with a date and signature. Green will keep copies of the paperwork segregated for ease of review during any statutory disqualification examination;
6. Green will review all incoming correspondence (excluding email) addressed to or relating to Brown, upon its arrival and will review outgoing correspondence (excluding email) before it is sent;
7. For the purposes of client communication, Brown will only be allowed to use an email account that is held at NYLIFE, with all emails being filtered through NYLIFE's email system. If Brown receives a business-related email message in another email account outside NYLIFE, he will immediately deliver that message to NYLIFE's email account. Brown will also inform NYLIFE of all outside email accounts that he maintains and will provide the Firm access to those accounts upon request. NYLIFE's Agency Standard Email Surveillance team will conduct a weekly review of all email messages that are either sent to or received by Brown

¹⁰ Items 6-10 are heightened supervisory conditions that are not standard supervisory procedures for representatives of the Firm.

(in addition to Green's review pursuant to item number 6).¹¹ Green will be notified of any problematic or flagged emails identified through the weekly reviews. Green will document any instance where Brown's emails are flagged and she will prepare a memorandum to the file with full details as to the review, investigation and resolution of the matter. All of Brown's emails will be maintained and indexed for ease of retrieval during any statutory disqualification examination;

8. Green will conduct semi-annual credit checks to monitor Brown's financial status using a third party vendor. Green will document the outcome of each credit check and she will maintain and keep segregated all documentation related to the credit checks for ease of review during any statutory disqualification examination;
9. Green will conduct quarterly public records searches to monitor Brown's financial status. Green will document the outcome of each quarterly public record search and she will maintain and keep segregated all documentation related to the public records searches for ease of review during any statutory disqualification examination;
10. On a quarterly basis, Brown will certify in writing to Green and Lutz that he has read the Firm's current Code of Conduct and other applicable Firm policies pertaining to his obligations to disclose legal and regulatory matters to the Firm, and that he fully understands his obligations thereunder. Green will maintain copies of Brown's certifications and will keep them segregated for ease of review during any statutory disqualification examination, and Green will confirm the accuracy of Brown's certifications and will perform any necessary review in connection therewith;
11. If Green is to be on vacation or out of the office for an extended period, Lutz, also located at the same branch office as Brown, will act as the alternate supervisor responsible for carrying out and documenting that each of the supervisory steps included and described in this plan is carried out;
12. All complaints pertaining to Brown, whether verbal or written, will be immediately referred to Green for review. Green will prepare a memorandum to the file with full details as to the review, investigation and resolution of the matter. Documents pertaining to these complaints will be kept segregated for ease of review during any statutory disqualification examination;
13. The Firm must obtain prior approval from Member Regulation if it wishes to change Brown's primary or alternate supervisors to other persons; and

¹¹ The review conducted by NYLIFE's Agency Standard Email Surveillance is based on a key word search. In the event that a key word is found in any email, that email is then forwarded to the reviewer, which in the case of Brown, would be Green and Lutz.

14. Green will certify quarterly (March 31st, June 30th, September 30th and December 31st) to the Compliance Department that she and Brown are in compliance with all of the above conditions of heightened supervision to be imposed upon Brown. The certifications will be maintained and kept segregated for ease of review during any statutory disqualification examination.

FINRA certifies that: (1) Brown meets all applicable requirements for the proposed employment; (2) the Firm is a member of the Municipal Securities Rulemaking Board; (3) the Firm has represented that Brown is not related to Green or Lutz by blood or marriage; and (4) the Firm employs five other statutorily disqualified individuals.

VII. Conclusion

Accordingly, we approve the Firm's Application to continue to employ Brown as an investment company and variable contracts products limited representative, subject to the above-mentioned heightened supervisory procedures. In conformity with the provisions of Exchange Act Rule 19h-1, the association of Brown with the 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,

Jennifer Mitchell Piorko
Vice President and Deputy Corporate Secretary